No. 73-1977

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

ALYESKA PIPELINE SERVICE COMPANY,
Petitioner

v.

THE WILDERNESS SOCIETY, ENVIRONMENTAL DEFENSE FUND, INC., AND FRIENDS OF THE EARTH,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENTS

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 495 F.2d 1026 (1974) and will be referred to herein as "*Wilderness Society II*." The opinion of the court of appeals on the merits of the case is reported at 479 F.2d 842, *cert. denied*, 411 U.S. 917 (1973),

and will be referred to herein as "*Wilderness Society I.*"

QUESTIONS PRESENTED

1. Whether, following its adjudication on the merits of the Trans-Alaska Pipeline controversy, the court below had the equitable power to authorize a partial shifting of fees from respondents to petitioner.

2. If so, whether the shifting of fees authorized by the court was an abuse of discretion when the record supports the conclusions that:

a. Respondents' successful litigation vindicated important Congressional policies and led to substantial benefits, including legislation imposing significant new environmental, technological and other safeguards; the litigation was necessary to achieve those ends; and the litigation, undertaken by respondents as private citizens for no economic gain, was massive and placed heavy burdens on respondents and their counsel; and

b. The Trans-Alaska Pipeline was conceived and proposed by petitioner; the litigation resulted from actions and decisions for which petitioner was responsible (and, in the case of the Mineral Leasing Act, from obligations that were directly enforceable against petitioner); the economic gain that petitioner hoped to derive from the pipeline made it the real party in interest in the litigation; petitioner took a major and active role in the litigation to protect its economic interests; petitioner received direct benefits from the litigation and can distribute the award among other beneficiaries; and the award does not otherwise work any hardship or unfairness on petitioner.

STATEMENT OF THE CASE

A. Introduction

Attorneys' fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor. This is the traditional American rule. Just last Term this Court reaffirmed the appropriateness of the rule in "everyday commercial litigation." *F. D. Rich Co.* v. *United States*, 417 U.S. 116, 130 (1974). The rule and its basic rationale were accepted by the court below.[1] Neither is being challenged in this case.

What is in issue is the application to the facts of this case of an equitable power that is as "traditional" and "historic" as the American rule itself. It is the power of federal courts to award attorneys' fees "in exceptional cases and for dominating reasons of justice." *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 167 (1939).[2] When reviewing awards of fees

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[1] The decision below was prefaced by an acknowledgement that: "[T]he American rule barring attorneys' fees to successful litigants except in extraordinary circumstances is based on important policies of its own. But if the matter is examined closely . . . . an award of fees in the present case may be justified by reference to the very same policies." *Wilderness Society II*, 495 F.2d at 1031.

[2] As the Court noted in *Sprague*, the power of federal courts to award fees derives from "the original authority of the chancellor to do equity in a particular situation." 307 U.S. at 166. *See* cases and authorities cited at 307 U.S. 164 n.1, 165 n.2. *See generally* Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. Pa. L. Rev. 636, 645 (1974); Goodhart, *Costs*, 38 Yale L. J. 849, 854 (1929); McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 Minn. L. Rev. 619,

by lower federal courts, this Court has been concerned primarily with whether the fee award in a particular case was beyond the power of the lower court.[3] Once satisfied on this point, the Court has traditionally recognized that the court with detailed knowledge of the case is usually in a better position to make the "ultimate judgment . . . as to the fairness of making an award, or the extent of such an award." *Sprague*, 307 U.S. at 167.[4]

619-20 (1931); Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. Colo. L. Rev. 202, 204-05 (1966); Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U. L. Rev. 301, 313-14 (1973).

[3] *See, e.g., Hall* v. *Cole*, 412 U.S. 1, 4-14 (1973); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 389-397 (1970); *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 714-15 (1967); *Sprague, supra*, 307 U.S. at 164; *Trustees* v. *Greenough*, 105 U.S. 527, 537 (1882).

[4] *See, e.g., Hall* v. *Cole*, 412 U.S. at 14-15 (standard of review is whether "the award of counsel fees to respondent under the facts of this case constituted an abuse of the district court's discretion"); *Trustees* v. *Greenough*, 105 U.S. at 537 (the court below should have "considerable latitude . . . since it has far better means of knowing what is just and reasonable").

As Circuit Judge Walter Sanborn stated many years ago in a case reviewing the amount of an attorneys' fee award:

> "The judge who entered this decree below was familiar with the proceedings in his own court, with the character of this litigation, with the controversies, if any, that had arisen in it, with the amount of services that had been rendered by each of the solicitors, and with every step that had been taken in the case . . . . Its finding and decree thereon . . . must be taken as presumptively correct; and, unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the considera-

The decision below rests on a judgment by the court that adjudicated the Trans-Alaska Pipeline controversy (1) that overriding equitable factors were present in the case that support a shifting of fees *from* respondents and (2) that, in the circumstances of the case, it was fair and equitable to shift a portion of those fees *to* the Alyeska Pipeline Service Company ("Alyeska"). Respondents respectfully suggest that an understanding of the record on which the court's judgment rests requires a fuller factual statement than that set forth in Petitioner's Brief ("P. Br.").

B. Statement of Facts

1. Identification of the Parties

Petitioner, Alyeska Pipeline Service Company, is owned by a consortium consisting of Exxon Pipeline Company, Mobil Pipeline Company, ARCO Pipeline Company, Phillips Petroleum Company, Union Oil Company of California, Sohio Pipeline Company, and Amerada-Hess Corporation. Those companies, or their beneficial owners, hold the rights to explore and develop the substantial oil and natural gas resources in Prudhoe Bay on the North Slope of Alaska. Alyeska was formed to construct and operate the Trans-Alaska Pipeline System—the system Alyeska's principals have chosen to transport oil from Prudhoe Bay to markets in the lower 48 states.

Respondents, The Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth,

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tion of the evidence, the decree should be permitted to stand." *Farmers' Loan & Trust Co.* v. *McClure*, 78 F. 209, 210 (8th Cir. 1897).

are non-profit organizations. Each of the organizations has had a long-standing concern for the Alaskan environment and a commitment to preserve it for present and future generations.

2. Description of the Trans-Alaska Pipeline System

The Trans-Alaska Pipeline System has come to be recognized as the "most complex" and "most ecologically sensitive" private engineering project ever attempted.[5] The overland portion of Trans-Alaska Pipeline System will traverse the State of Alaska from Prudhoe Bay on Alaska's North Slope to the Port of Valdez on Prince William Sound in the south —a distance of some 800 miles (641 of which cross federal public lands). From Valdez the oil will be loaded onto tankers to be transported through Prince William Sound and down the Northeast Pacific.

At Appendices A and B, respectively, respondents have reproduced from their papers below a description of the Trans-Alaska Pipeline System and a compilation of some of its still-unknown environmental

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[5] Statement of Under Secretary of the Interior, William T. Pecora, contained in record below at P. Docs. III, Tab B, at 4 (R. 207).

Documents in the record below will be cited either as "Ad. Rec.," which refers to the documents collected by Interior Department lawyers and designated by them as the "Administrative Record" (R. 239); "FIS," which refers to the Interior Department's Final Impact Statement on the project (R. 239); and "Rule 9(h) Documents" and "P. Docs.," which refer to compilations of documents introduced into the record by respondents in the proceedings below (R. 152, R. 207).

ramifications.[6] Both Appendices are based entirely on statements contained in the Interior Department's Final Impact Statement. They will, hopefully, place the litigation in context by conveying some understanding of the environmental and technological problems posed by the Trans-Alaska Pipeline. For, as Russell E. Train has observed:

> "[T]he case of the Alaska pipeline has not been simply one of aesthetics, or of concern over wildlife and wilderness disturbance, or worries over water pollution, important as all of these are. It was clearly an example where sound environmental analysis was essential to sound engineering."[7]

3. Chronological Summary of the Litigation Below

a. *Events Preceding the Commencement of Litigation*

In August 1968, substantial oil and gas reserves were discovered on the Alaskan North Slope. In

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[6] Appendix A is taken verbatim from pages 3-12 of Respondents' *Brief on National Environmental Policy Act Issues* (R. 206).

Appendix B, is taken verbatim from Appendix B of the Appendices to Respondents' *Brief on National Environmental Policy Act Issues* (R. 207).

[7] Address by the Honorable Russell E. Train to the Joint Judicial Conference of the Eighth and Tenth Circuits, June 29, 1973, quoted at *Wilderness Society II*, 495 F.2d at 1033 n.3.

Mr. Train (who is now Administrator of the Environmental Protection Agency) was Under Secretary of the Interior and Chairman of the Federal Task Force on Alaskan Oil Development when Alyeska's principals first submitted their proposal.

June 1969, the interested oil companies, Alyeska's principals, filed with the Interior Department a formal application for an oil pipeline right-of-way across the public lands of Alaska.[8] Alyeska's principals recognized from the outset that the right-of-way allowed by statute was not adequate for the pipeline they proposed:

> *"The 54' R.O.W. [right-of-way] which is allowed by statute is not adequate for the construction of a 48" pipeline. The R.O.W. should be 100' width* to accommodate the extremely large equipment that is necessary to handle the 48" pipe, and the large *spoil [from] excavated soil . . . ."* (Emphasis added).[9]

And supplemental papers filed by them at the time contained only generalized descriptions about how they proposed to construct the pipeline.[10] Nonetheless, they requested right-of-way permits "by July" so that construction-related activities could begin immediately.[11]

The permit application was referred to a Federal Task Force, which, on September 15, 1969, issued a report which concluded that the oil companies

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[8] Ad. Rec. 1.1.1.2 (R. 239).

[9] Letter from Kenneth P. Fountain, attorney for the Trans-Alaska Pipeline System to the Honorable Russell E. Train (then Under Secretary of the Interior), June 10, 1969, Rule 9(h) Documents, Tab B, p. 102 (R. 152) (Jt. App. 46).

[10] *See, e.g., Trans-Alaska Pipeline System's Answers to Questions*, June 19, 1969, P. Docs. I, Tab F; Ad. Rec. 1.1.2.1 (R. 207, R. 239).

[11] Letter from Kenneth P. Fountain, *supra*, Rule 9(h) Documents Tab B, p. 101 (R. 152) (Jt. App. 43).

"had not adequately finalized their own plans on a technological level" and were not in a position even to "use data from their own ongoing studies." [12] The report also concluded that a "complex and interrelated scope of environmental, technological, social and legal problems" remained to be solved.[13] Included among the legal problems identified in the report was the absence of statutory authority for the right-of-way requested.[14]

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[12] *Preliminary Report to the President*, Federal Task Force on Alaskan Oil Development, September 15, 1969, Rule 9(h) Documents, Tab C, p. 3; Ad. Rec. 1.1.2.1 (R. 152, R. 239) (Jt. App. 81).

[13] *Id.* at 5 (Jt. App. 82). The environmental problems identified in the report related to permafrost, seismic activity, water pollution (both with regard to the overland portion and in the operation of tankers on the marine leg of the system), and impacts on fish and wildlife.

[14] The report contained the following:

"*Width of the right-of-way*: The application requests a 54-foot wide pipeline right-of-way together with an additional parallel and adjacent 46-foot right-of-way. Further, for all sections between Livengood and the North Slope, the applicants request another 100-foot right-of-way for a construction road, making a total requirement of 200 feet in width for that distance.

"The authorizing statute (30 U.S.C. 185) limits pipeline rights-of-way to 25 feet on either side of center line, or to a total of 54 feet. Discussions are continuing between the Department and TAPS to determine the exact method by which TAPS will acquire the additional 46 feet for the pipeline right-of-way and the further addition of a 100-foot right-of-way for a construction road." *Id.* at 11 (Jt. App. 86).

Throughout the remainder of 1969, and the early months of 1970, Alyeska's principals pressed for the commencement of the pipeline-related construction.[15] Their efforts were successful in part when, in March 1970—at a time when the "complex and interrelated . . . environmental, technological, social and legal problems" referred to by the Task Force remained largely unsolved and barely two months after the enactment of the National Environmental Policy Act—Secretary Hickel announced that the first stage of pipeline-related construction, a haul road for the pipeline from the Yukon River to the North Slope, was about to begin.[16] That authorization was recognized within the Interior Department as approval of the pipeline itself.[17] On March 20, 1970, to "fulfill the requirements of Section 102(2)(c) of the National Environmental Quality [sic] Act of 1969," a cursory seven-page document titled "*Environmental Statement: Yukon River-North Slope Road*" was forwarded to the Council on Environmental Quality.[18]

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[15] *See, e.g.*, Department of the Interior News Release, January 14, 1970, P. Docs. I, Tab I (R. 207).

[16] Letter from Secretary Hickel to President Nixon, March 5, 1970, P. Docs. I, Tab K (R. 207).

[17] Memorandum for the Record of North Slope Task Force Working Group Meeting, June 17, June 18, 1969, P. Docs. I Tab K ("once we sanction any part of the road right-of-way we are actually approving the pipeline and furthermore render it difficult or impossible to make major route changes . . . .") (R. 207).

[18] P. Docs. I, Tab K (R. 207).

b. *Commencement of the Litigation and Issuance of an Injunction*

The decision to proceed with the project in this manner led respondents to seek the assistance of counsel. Recognizing that a major, ongoing legal effort would be required which they could not themselves afford and which, whatever its outcome, would result in no award of monetary damages, respondents obtained the assistance of attorneys from the Center for Law and Social Policy. The Center is modelled along the lines of such organizations as the NAACP Legal Defense and Educational Rund. Its attorneys provide legal representation in poverty law, consumer, environmental, and other areas to groups and individuals who, for economic reasons, cannot obtain legal representation from traditional law firms.[19]

On March 26, 1970, respondents filed a complaint against the Secretary of the Interior (R. 1A) and a Motion for Preliminary Injunction, together with extensive affidavits from zoologists, biologists, ornithologists, geologists, seismologists, botanists, and pipeline engineers (R. 3A). On April 23, 1970, the district court held that irreparable injury was likely to result from the commencement of the construction-related activities in question and granted respondents' Motion for Preliminary Injunction (R. 26). The injunction was premised on two grounds: (1) that the application of Alyeska's principals exceeded the limitations that Congress had established in Section 28

[19] As the litigation progressed, additional legal assistance was provided by attorneys on the staffs of the Environmental Defense Fund and the Natural Resources Defense Council.

of the Mineral Leasing Act of 1920 (30 U.S.C. § 185) on the amount of public lands that could be diverted to pipeline use; and (2) that the environmental and other safeguards set forth in the National Environmental Policy Act of 1969 (42 U.S.C. § 4321 *et seq.*) had not been applied to the project. *Wilderness Society* v. *Hickel*, 325 F. Supp. 422 (D.D.C. 1970).

c. *Events Preceding the Court of Appeals' Decision on the Merits*

On January 15, 1971, almost a year after the issuance of the preliminary injunction, the Interior Department published a "Draft Impact Statement" on the proposed pipeline. Ad. Rec. 2.13 (R. 239).[20] Discovery disclosed that before publication drafts of the statement were given to Alyeska and substantial revisions were made at Alyeska's behest to delete or soften numerous negative observations about

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[20] In the interim, respondents had undertaken an extensive discovery effort in the district court. *See, e.g., Interrogatories of Plaintiff* [hereinafter referred to as "Respondents"] *to Defendant*, May 20, 1970 (R. 27); *Interrogatories of Respondents to Defendant*, June 12, 1970 (R. 31); *Request of Respondents for Defendant To Produce for Inspection Certain Documents*, July 20, 1970 (R. 36); *Motion of Respondents To Compel Answers to Interrogatories*, July 24, 1970 (R. 37); *Request of Respondents for Admissions Pursuant to Rule 36*, August 20, 1970 (R. 43); *Request of Respondents for Production of Documents*, September 30, 1970 (R. 46); *Motion of Respondents To Compel Answers to Interrogatories and Inspection of Documents*, November 10, 1970 (R. 52); *Supplemental Memorandum of Respondents in Support of Their Motion to Compel Answers to Interrogatories and Inspection of Documents*, December 8, 1970 (R. 56); *Interrogatories to Defendant as Amended*, February 22, 1971 (R. 60).

the proposal.[21] At substantial cost and effort, respondents arranged for expert witnesses in a broad range of technological, environmental, and other disciplines to appear at public hearings and describe the major defects that remained in the Alyeksa proposal.[22]

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[21] *See* Deposition of Deputy Under Secretary of the Interior Jack O. Horton at 101-02, 111-12, 116 and Exhibits A-E thereto (R. 217). *See also* documents collected at P. Docs. II, Tab B (R. 207).

[22] A summary of *Public Comments on the January Statement* was submitted to the court below as Appendix C in Respondents' *Appendices to Brief on National Environmental Policy Act Issues* (R. 207).

Respondents were not alone in their criticism. Almost every federal agency with expertise in environmental matters commented critically on Alyeska's lack of readiness in a broad range of areas. A summary of *Agency Comments on the January Statement* was submitted to the court below as Appendix D in Respondents' *Appendices to Brief on National Environmental Policy Act Issues* (R. 207). The following comments are illustrative:

> *Pipeline Engineering*—"The draft environmental statement is seriously weakened by the lack of technical design details. These details are unavailable from the permit applicant because he has not yet developed the final pipeline, monitoring systems and related designs. The weakness results in broad assurances that environmental degradation will be kept to a minimum . . . ." (Letter from EPA Administrator Ruckelshaus to Secretary Morton, March 12, 1971, p. 8, ¶ 3) (FIS, Vol. 6, p. A-43; Ad. Rec. 2.14.6.3.1) (R. 239).
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> * * * *
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> *Seismological Problems*—"The statement discusses some of the potential problems related to seismic activity but the references to the seismology problems are

It was only after these hearings that efforts were begun to evaluate realistically the full range of technological and environmental problems posed by the Trans-Alaska Pipeline and to devise ways to re-

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incomplete. An appropriate evaluation would require a full report detailing the earthquake . . . risks . . . . [I]t is recommended that detailed studies be made for the diverse earthquake problems related to the pipeline. This would involve the field of engineering seismology and the application of strong motion data . . . . This is essential in view of the variance in surface geology which will support the pipeline structures." (Comments of Office of Assistant Secretary of Commerce for Environmental Affairs, April 16, 1971, pp. 10-11) (FIS, Vol. 6, p. A-78; Ad. Rec. 2.14.6.3.1) (R. 239).

* * * *

Detection of Terrestrial Oil Spills and Leaks—"The seismic and leak monitoring systems are to provide the basic alert mechanism to protect the environment against major crude oil releases. Yet, according to the draft statement these systems have not been designed. Therefore, it is not possible to determine their efficiency and dependability." (Letter from EPA Administrator Ruckelshaus to Secretary Morton, March 12, 1971, p. 4, ¶ 5) (FIS, Vol. 6, p. A-44; Ad. Rec. 2.14.6.3.1) (R. 239).

* * * *

Monitoring Systems—"The monitoring of the system will be critical to its safe operation and to the avoidance of leaks and spills. Much additional data is required on precisely how the monitoring will function, before it will be possible to make a judgment on the safety and integrity of the system." (Comments by the Department of Transportation, March 24, 1971, p. 1) (FIS, Vol. 6, p. A-55; Ad. Rec. 2.14.6.3.1) (R. 239).

* * * *

Marine Transport—"In particular, we feel that the transshipment of oil from the Port of Valdez to other

duce the substantial risks that remained both to the physical integrity of the pipeline and to the surrounding environment. Alyeska finally began compiling a comprehensive Project Description,[23] and a completely new environmental impact statement drafting team was organized by the Interior Department.[24]

Following the submission of its Project Description to the Interior Department in July and August 1971, Alyeska sought leave to enter the litigation as a party defendant. In papers filed in district court on August 20, 1971, Alyeska asserted that:

> "[I]t is Alyeska and its shareholders, and not the Plaintiffs or Defendant [*i.e.*, the Secretary

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coastal points in the continental United States to be as serious a concern and responsibility of the Federal Government in terms of probable adverse environmental impact as anything occurring in the State of Alaska itself. The statement should carefully and accurately evaluate the risk of massive oil-spills, in international waters proximate to Canada, along the northwest coast of the United States, and in the Puget Sound area of Washington State, in considering whether to approve or disapprove the Alyeska proposal, and in deciding whether lesser risks may occur by recourse to other means of transporting oil from the Prudhoe Bay oilfields." (Letter from Secretary of HEW to Secretary Morton, July 6, 1971, p. 4) (FIS, Vol. 6, p. A-103; Ad. Rec. 2.14.6.3.1) (R. 239).

[23] Deposition of Dr. Frederick Sanger, Chairman of the Interior Department's Technical Advisory Board, at 8 (R. 221).

[24] Deposition of Dr. David A. Brew, Chairman of the Interior Department's Environmental Impact Statement team, at 7, 88-89 (R. 220).

> of the Interior] which have the 'real economic stake in the outcome of this litigation' . . . ." [25]
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> * * * *
>
> "[Alyeska's] interests cannot be represented adequately by existing parties; the responsibilities and duties of the Secretary of Interior, do not include or concern the proprietary and financial interests of Alyeska or the companies with whom Alyeska has contracted and for whom it is authorized to act as agent and attorney-in-fact in connection with the applications which are the subject of this action." [26]

Those interests were so strong, Alyeska asserted, that:

> "Alyeska as a private party may well have a greater interest than the Secretary of the Interior in advancing arguments in support of the Secretary's authority to issue the necessary rights-of-way and permits." [27]

Alyeska's motion was granted on September 20, 1971 (R. 84) without opposition from respondents (R. 79).[28] Once in the litigation, Alyeska pursued its interests vigorously.[29]

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[25] *Memorandum of Points and Authorities in Support of Alyeska Pipeline Service Company's Motion to Intervene*, pp. 7-8 (R. 77).

[26] *Motion of Alyeska Pipeline Service Company To Intervene as a Defendant*, p. 4 (R. 77).

[27] *Memorandum, supra*, note 25, at 11-12 (R. 77).

[28] On September 10, 1971, the State of Alaska was also allowed to intervene as a party defendant (R. 83), again without opposition from respondents (R. 81).

[29] The 78 docket entries between the date of Alyeska's intervention (September 20, 1971) and the filing of respond-

On March 20, 1972, the Interior Department released to the public a six-volume Environmental Impact Statement and a three-volume Economic and Security Analysis. Ad. Rec. 2.14 (R. 239). In response to the Secretary's announcement that he would withhold decision for 45 days to permit public comment, respondents disseminated the impact statement to a large number of experts across the country and submitted their comments to the Secretary on May 4, 1972.[30]

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ents' *Motion for Partial Summary Judgment* on May 12, 1972 (R. 152) belie the assertion in Alyeska's brief (P. Br. 5) that "proceedings in the district court . . . [were] essentially dormant" following its intervention. Alyeska participated extensively in a broad range of procedural matters during this period. *See, e.g., Memorandum of Points and Authorities Submitted by Defendant Alyeska Pipeline Service Company in Support of Defendant's Motion To Have the Action Maintained as a Class Action*, November 23, 1971 (R. 106); *Memorandum of Alyeska Pipeline Service Company in Opposition to the Motion by David Anderson and the Canadian Wildlife Federation To Intervene*, November 30, 1971 (R. 111); *Memorandum of Alyeska Pipeline Service Company in Opposition to Respondents' Motion To Clarify the Preliminary Injunction*, December 1, 1971 (R. 114); *Response of Alyeska Pipeline Service Company to Motion for Protective Order*, December 13, 1971 (R. 127); *Memorandum of Alyeska Pipeline Service Company in Opposition to Respondents' Motion To Compel Production of Documents*, February 18, 1972 (R. 140).

[30] The comments submitted by respondents were organized in four volumes relating to Technical Comments (I), Terrestrial Impact (II), Marine Impact (III), and Economics, National Security and Systematic Evaluation and Balancing of Alternatives (IV). *See* Ad. Rec. 4.3.2.1 (R. 239).

On May 11, 1972, the Secretary announced through a News Release that Alyeska would be granted the permits it requested for the Trans-Alaska Pipeline.[31] The Secretary indicated that a dual permit device would be utilized to accommodate Alyeska's land needs. That is, permits designated "right of way" permits would be issued for the first fifty feet required by Alyeska and permits designated "special land use permits" would be issued for whatever additional contiguous lands Alyeska might need.

On May 12, 1972, respondents filed a Motion for Partial Summary Judgment on the Mineral Leasing Act issues in the case (R. 152). In their accompanying brief, respondents contended that Congress enacted the Mineral Leasing Act as a conservation measure; that its width limitation was designed to assure that if more land was needed for larger pipelines Congress would have the opportunity to consider whether and under what conditions such land might be used; and that the contemplated dual permit device violated both the Mineral Leasing Act and the Interior Department's own regulations. Respondents contended further that the Mineral Leasing Act presented a threshold legal issue, the adjudication of which could be dispositive of the case.[32]

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[31] The release is contained at Tab A of Respondents' *Appendices to Brief on the Mineral Leasing Act Issues* (R. 152).

[32] *See, e.g.*, Respondents' *Motion for Partial Summary Judgment*, May 12, 1972, at 1 (R. 152) (Jt. App. 139):

> "The grounds for [respondents'] motion are that the Mineral Leasing Act issues present threshold questions resting on operative facts that are different from and independent of the operative facts of [respondents'] claims under the National Environmental Policy Act

Respondents suggested, therefore, that the Mineral Leasing Act issues be decided without further delay.[33]

Alyeska vigorously opposed respondents' Motion. Alyeska argued in part that a full presentation of the Natural Environmental Policy Act ("NEPA") issues in the case was necessary to provide a factual predicate for an informed judgment on the Mineral

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("NEPA"); the NEPA issues need be adjudicated only if the permits contemplated by the Secretary are not prohibited by the Mineral Leasing Act; and if said permits are prohibited by the Mineral Leasing Act; it would be a waste of judicial time and effort for [the] court to adjudicate the far more complicated NEPA issues which would, in that event, be reduced to hypothetical questions."

[33] Respondents' *Response to Defendant's Motion To Defer Consideration of Respondents' Motion for Partial Summary Judgment Under the Mineral Leasing Act*, May 19, 1973, at 2 (R. 162) (Jt. App. 160-61):

> "The oil companies have had three full years to figure out why the Mineral Leasing Act does not mean 50 feet when it says 50 feet. Surely, they—and the Secretary—should now be required to provide their explanations . . . .
>
> "[Respondents] suggest, therefore, that defendants be required to file responsive briefs to [respondents'] Motion for Pretrial Summary Judgment within ten (10) days (they have already had the motion for seven days); followed by an expeditious consideration by the Court of the merits of [respondents'] motion. If the Court concludes that [respondents'] contentions are clearly correct—as it preliminarily concluded in April, 1970—if can then afford defendants the opportunity of an expedited appeal (which defendants could make either to the Court of Appeals or as may be far more appropriate, and likely, to Congress)."

Leasing Act issues. Alyeska argued further that such a presentation would lead to the rejection of respondents' Mineral Leasing Act arguments:

> "Both the permit issues and those relating to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4331 *et seq.*, are inseparably associated with the technical details of how the trans-Alaska pipeline system will be built. Alyeska is confident that when the [respondents'] contentions are examined by this Court with a full factual understanding of the project, the scope of the Secretary's power to issue the requested permits and the past policies and practice of the Department of the Interior, the Court will reject those contentions." [34]

Alyeska prevailed in its position (R. 164). Respondents' motion was held in abeyance while discovery on the NEPA issues (which had theretofore been deferred at the request of Alyeska and the other defendants) was completed on an expedited basis.[35]

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[34] *Memorandum of Alyeska Pipeline Service Company in Support of Defendant's Motion To Place Respondents' Motion for Partial Summary Judgment in Abeyance*, May 17, 1972, at 7-8 (R. 154) (Jt. App. 147-48).

[35] Depositions were taken on May 18, 1972 (R. 217), May 24, 1972 (R. 220), May 31, 1972 (R. 221), June 6, 1972 (R. 222), June 8, 1972 (R. 223), June 16, 1972 (R. 224), and June 24, 1972 (R. 225). In addition, on May 26, 1972, Alyeska served on respondents extensive interrogatories designed to explore the adequacy of respondents' standing under *Sierra Club* v. *Morton*, 405 U.S. 727 (1972) (R. 165). The response to these interrogatories, which required information from respondents' officers and members across the country, was filed by respondents on June 26, 1972 (R. 194, R. 195).

The exposition of the NEPA issues in the case required an elaborate development of the technical details of the Trans-Alaska pipeline. Respondents dealt extensively with those details in their NEPA brief.[36] So did Alyeska, which filed extensive briefs which, when printed, filled over 300 pages (more than the combined totals of the other defendants) (R. 205, R. 230). The result was a record and set of briefs that set forth the entire fact picture that Alyeska had contended was necessary for a fully informed decision in the case.

On August 14 and 15, 1972, the district court heard argument in the case. Alyeska was allocated

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[36] See Respondents' *Brief on National Environmental Policy Act Issues*, at 3-12, 54-59, 72-80 (R. 206). (Page references are to the printed version of the brief, filed on September 13, 1972, in the court of appeals.)

The principal NEPA issues raised by respondents were: *First*, that by focusing on Alyeska's proposal for North Slope oil, and effectively excluding from consideration a second (gas) pipeline which the Interior Department acknowledged would be constructed across Canada in any event, the impact statement did not set forth the full implications of the Alyeska proposal or analyze the realistic alternatives to it. These alternatives were (1) an oil and gas pipeline across Alaska *plus* marine transport of oil through Prince William Sound and down the Northeast Pacific *plus* a completely separate pipeline route for North Slope natural gas across Canada or (2) a single overland corridor across Canada which could accommodate both the oil and gas pipelines. *Id.* at 39-64. *See* Appendix A, *infra*. *Second*, that in view of the substantial number of indeterminacies acknowledged in the impact statement, the statement should also have indicated the steps, if any, being taken to close those gaps and discuss the risk of proceeding in the face of so many indeterminacies. *Id.* at 65-86. *See* Appendix B, *infra*.

the major portion of defendants' time on both the Mineral Leasing Act and NEPA issues. On August 15, 1972, the district court ruled from the bench in defendants' favor. The court declined, however, to set forth reasons for its decision on the grounds that it would take "weeks and months to complete" an "exhaustive, legal opinion" and that "the appellate process [should] be initiated as soon as possible." [37]

4. The Court of Appeals' Decision on the Merits

An expedited appeal to the court of appeals ensued. Oral argument was held on October 6, 1972, with Alyeska again allocated the main portion of defendants' argument. Since no opinion had been issued below, it was necessary for the court of appeals to conduct its own five-month review of the voluminous record. On February 9, 1973, the court rendered its exhaustive opinion in *Wilderness Society I*.

The focus of the court's opinion was on the Mineral Leasing Act. The court concluded that, on its face, Section 28 of the Mineral Leasing Act precluded issuance of the right-of-way permits requested

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[37] *See Wilderness Society* v. *Morton*, 4 ERC 1467 (D.D.C. 1972).

At the conclusion of the two-day oral argument, the district court remarked:

> "I have never seen a case more thoroughly or better briefed on all sides. I can hardly imagine that anyone of you could brief it more extensively or better." Transcript, *Hearings before District Court*, August 15, 1972, at 360.

by Alyeska. *Wilderness Society I*, 479 F.d at 855.[38] The opinion demonstrated further that the width limitation contained in Section 28 was a device consciously chosen by Congress to "maintain control over pipeline rights-of-way and to force the *industry* to come back to Congress if the amount of land granted was insufficient for its purposes." *Id.* at 892. (Emphasis added).

As explained in the opinion, the Mineral Leasing Act was the product of a debate on public land use

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[38] The full text of Section 28 of the Mineral Leasing Act is set forth at P. Br., App. A. The section provided in pertinent part that:

> "*Rights of way through the public lands . . . may be granted by the Secretary of the Interior* for pipe-line purposes for the transportation of oil or natural gas . . . *to the extent of the ground occupied by the said pipe line and twenty-five feet on each side* of the same under such regulations and conditions as to survey, location, application, and use as may be prescribed by the Secretary of the Interior . . ." (Emphasis added).

The section also provided:

> "That *no right-of-way shall hereafter be granted* over said lands for the transportation of oil or natural gas *except under and subject to the provisions, limitations and conditions of this section.*" (Emphasis added).

And the section contained a specific forfeiture provision in the event of any "failure to comply with the provisions of this section":

> "*Failure to comply with the provisions of this section* or the regulations and conditions prescribed by the Secretary of the Interior *shall be ground for forfeiture of the grant by the United States district court for the district in which the property, or some part thereof, is located in an appropriate proceeding.*" (Emphasis added).

extending over several Congresses. It was triggered by Congress' concern that "in the past, when granting rights-of-way to railroads, it had been much too generous in giving away valuable public lands, and it did not want this to be repeated." *Wilderness Society I*, 479 F.2d at 863. Over the years preceding the Act's passage, Congress considered various width limitations for oil and gas pipelines. *Id.* at 856. Congress was warned by oil and gas pipeline proponents that a fifty-foot width limitation would not accommodate future pipeline developments. *Id.* at 859. Nonetheless, Congress selected that width limitation because it was sufficient for pipeline construction methods with which it was familiar. *Id.* at 863 n. 47. If interested oil companies needed more land, Congress intended for them to "come back and try to get a more liberal law." *Ibid.*

In light of the above, the court concluded that:

> "Article 4, § 3, Cl. 2 of the Constitution provides that 'The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory [or] other Property belonging to the United States.' The power over the public land thus entrusted to Congress is without limitations." *Id.* at 891.
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> * * * *
>
> "*These companies* have now come into court, accompanied by the executive agency authorized to administer the statute, and have said, 'This is not enough land; give us more.' We have no more power to grant *their request*, of course, than we have the power to increase congres-

sional appropriations to needy recipients." *Ibid.* (Emphasis added).[39]

With regard to the National Environmental Policy Act issues in the case, the court concluded that the parties had presented "complex and important questions." *Id.* at 889. Those questions, the court was later to say, were interrelated with the Mineral Leasing Act issues and had served as a predicate for a "precise analysis" of those issues. *Wilderness Society II*, 495 F.2d at 1035. But the necessity for prior Congressional action could moot, or developments pending Congressional action could alter, the factors bearing on a final resolution of the NEPA issues. *Wilderness Society I*, 479 F.2d at 889. Thus, although three dissenting judges would have reached the NEPA issues, the court declined to adjudicate them on tra-

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[39] It should be noted that in *Wilderness Society I* the court of appeals squarely rejected Alyeska's assertions that its decision to seek authorization from the Secretary rather than the Congress was supported by Interior Department "special land use permit" regulations and certain opinions of the Attorney General (P. Br. at 16 n. 11). The court there held that on their face the Department's "special land use permit" regulations and the Attorney General's opinions cited by petitioner precluded the type of permit Alyeska requested. *Id.* at 870-75.

The court also pointedly noted the irony that Alyeska "apparently did not know" about the so-called "administrative practice of over fifty years" (P. Br. at 30 n. 25) at the time Alyeska filed its application with the Secretary. 479 F.2d at 867. Indeed, a subsequent three-year search by Alyeska and Interior Department counsel into the files of Interior Department field offices in quest of such a practice produced no more than a handful of documented instances to which the court of appeals properly gave little weight in *Wilderness Society I*, 479 F.2d at 868.

ditional ripeness grounds, *id.* at 889-90, citing *Poe* v. *Ullman*, 367 U.S. 497 (1961) and 367 U.S. at 528 (Mr. Justice Harlan, dissenting).

Petitions for certiorari were filed on March 9, 1973, and respondents' opposition was filed on March 28. Five days later, on April 2, 1973, this Court denied certiorari, without dissent. 411 U.S. 917 (1973).

5. Public Law No. 93-153, 87 Stat. 576 [40]

With its jurisdiction over the public lands preserved, Congress embarked upon several months of intensive deliberations—filling thousands of pages of hearings [41] and reports.[42]

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[40] 30 U.S.C.A. § 185 (Supp. 1974); 43 U.S.C.A. § 1651 *et seq.* (Supp. 1974).

[41] *See, e.g., Hearings on S. 1040, S. 1041, S. 1056, S. 1081 Before the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess., pt. 1 (1973); *Hearings on S. 1040, S. 1041, S. 1056, S. 1081 Before the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess., pt. 2 (1973); *Hearings on S. 970, S. 993, S. 1565 Before the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess., pt. 3 (1973); *Hearings on S. 970, S. 993, S. 1565 Before the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess., pt. 4 (1973); *Hearings on H.R. 9130 Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs*, 93rd Cong., 1st Sess., Ser. No. 93-12, pt. 1 (1973); *Hearings on H.R. 9130 Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess., Ser. No. 93-12, pt. 2 (1973); and *Hearings on H.R. 9130 Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess., Ser. No. 93-12, pt. 3 (1973).

[42] *See, e.g.*, S. Rep. No. 93-207, 93d Cong., 1st Sess. (1973); H.R. Rep. No. 93-414, 93d Cong., 1st Sess. (1973); H.R. Rep.

That process convinced Congress that (1) it should enact a completely new legislative charter for pipelines crossing the public lands, incorporating stringent technological, environmental, and land use safeguards, and (2) that the construction of the Trans-Alaska Pipeline should proceed, subject to extensive safeguards set forth in the Act, without further litigation under the National Environmental Policy Act.[43]

With regard to Congress' decision to authorize the construction of the Trans-Alaska Pipeline, a proposal to declare that the actions already taken by the Secretary constituted compliance with NEPA was rejected.[44] But by a 49-49 vote in the Senate, requiring then Vice President Agnew to break the tie, and a 221-198 vote in the House, Congress nonetheless decided to permit construction of the pipeline without any further litigation under NEPA.[45]

The extensive hearings and debate had convinced Congress that during the forced delay of pipeline construction:

No 93-420, 93d Cong., 1st Sess. (1973); H.R. Rep. No. 93-617, 93d Cong., 1st Sess. (1973); H.R. Rep. No. 93-624, 93d Cong., 1st Sess. (1973).

[43] The text of Pub. L. No. 93-153 is set forth at Appendix C to this brief. The provisions of the Act are summarized at pp. 51-54 *infra*.

[44] H.R. Rep. No. 93-617, 93d Cong., 1st Sess. 27 (1973). Alyeska's assertion that Congress made "a legislative finding that the Department's efforts were fully adequate" (P. Br. 35) is in error.

[45] 119 Cong., Rec. S. 13,689-90 (daily ed. July 17, 1973); 119 Cong. Rec. H. 7281-82 (daily ed. Aug. 2, 1973).

> "[T]he risk of environmental damage . . . has been substantially lessened as a result of the stricter environmental stipulations, redundant safety systems, contingency planning and better engineering imposed upon the proposed Trans-Alaska pipeline." [46]

In language that mirrored *Wilderness Society I*, Congress determined that:

> "It is fitting and proper for Congress to make this decision. The issue is one of national importance. The issue involves the use of the public lands, the control of which the Constitution expressly reserves to Congress. It is the responsibility of Congress to decide whether the pipeline should be authorized." [47]

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[46] S. Rep. No. 93-207, 93d Cong., 1st Sess. 18 (1973).

These benefits were acknowledged by some of the pipeline's most ardent supporters. *See, e.g.*, Statement of Senator Gravel, *Hearings on S. 970, S. 993 and S. 1565 Before the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess., pt. 4, at 56 (1973) ("While the four-year delay in construction of the Alaska Pipeline has been costly to the United States in balance of payments and a worsening energy shortage, it has—and I think most of us agree, including the oil industry—served a very useful purpose. A safer line will be constructed today than could have been constructed four years ago."); Statement of then Under Secretary of the Treasury William E. Simon, *Hearings on S. 970, S. 993 and S. 1565 Before the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess., pt. 4, at 127 (1973) ("past delays and resultant research have greatly reduced the magnitude of [the] risks").

[47] H.R. Rep. No. 93-414, 93d Cong., 1st Sess. 14 (1973).

6. The Court of Appeals' Decision Awarding Attorneys' Fees

The court of appeals' decision in *Wilderness Society II* is discussed at length in the Argument Section of this brief.[48] In summary, the court concluded that in view of the extraordinary factual circumstances of this case respondents and their counsel should not be required to bear the entire cost of the litigation. The equitable factors relied on by the court in reaching this determination related to the importance of the congressional policies effectuated, the benefits conferred on others by the litigation, the massive legal efforts required, and the burden that that effort placed on respondents and their counsel. *Wilderness Society II*, 495 F.2d at 1030-36.

Having concluded that respondents and their counsel should not be required to bear the entire cost of the litigation, the court determined that the "equities of this particular case" justified a partial shifting of respondents' fees to Alyeska. The court explained that the Trans-Alaska Pipeline is Alyeska's project; the litigation stemmed from actions and decisions taken by Alyeska and for which Alyeska alone was responsible; Alyeska participated in the litigation as a "major and real party in interest"; and an award of fees against Alyeska could not deter it from pursuing its interests in court. *Id.* at 1030-38.

In this connection, the court made no provision for the efforts of respondents' counsel prior to Alyeska's entry into the case in September 1971.

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[48] The *Bill of Costs* on which the court acted is reproduced at Jt. App. 209-221.

Nor did the court authorize any shifting of fees for any legal effort undertaken after that date that was not related to the preparation and presentation of the briefs and oral argument that served as the basis for the court of appeals' decision on the merits. Even with regard to the latter, the court limited the award against Alyeska to "half of the total fees," [49] the "amount . . . [to] be fixed in the first instance by the District Court, after hearing evidence if necessary as to the extent and nature of the services rendered." *Id.* at 1036.

SUMMARY OF ARGUMENT

The power to award attorneys' fees in the absence of specific statutory authorization is not confined within rigid categories. It is a flexible, equitable power whose exercise depends upon the particular

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[49] The court explained:

"Under 28 U.S.C. § 2412 . . . no attorneys' fees can be imposed against the United States. . . .

* * * *

"Since Alyeska unquestionably was a major and real party at interest in this case, actively participating in the litigation along with the Government, we think it fair that it should bear part of the attorneys' fees . . . *In recognition of the Government's role in the case, on the other hand, Alyeska should have to bear only half of the total fees. The other half is properly allocated to the Government and, because of the statutory bar, must be assumed by appellants* [*i.e.*, respondents]. In this manner the equitable principle that appellees [*i.e.*, *Alyeska*] bear their fair share of this litigation's full cost and the congressional policy that the United States not be taxable for fees can be accommodated." 495 F.2d at 1036. (Emphasis added). (Footnote omitted).

facts of particular cases. The fee award here rests upon a determination that (1) overriding equitable factors support a shifting of fees *from* respondents and (2) it is fair and equitable to shift a portion of those fees *to* Alyeska. That determination was made by a court of appeals uniquely immersed in the facts of the case. (Point I).

The court identified four factors which in its judgment supported a shifting of fees *from* respondents. Respondents' litigation vindicated important Congressional policies; it conferred substantial benefits on others; massive private litigation was necessary to achieve those ends; and the litigation, undertaken for no economic gain, placed heavy burdens on respondents and their counsel. Each of the factors cited by the court finds ample support in the record. (Point II A). Moreover, each of the factors was an appropriate one for the court to consider in deciding whether to authorize a shifting of fees from respondents. (Point II B). Taken together, they demonstrate that the decision to shift fees from respondents rests upon unusually compelling considerations.

The Mineral Leasing Act was a landmark conservation measure designed to correct past abuses in public land management. Its width limitation was a protective device consciously designed by Congress to preserve for itself the opportunity to safeguard the public lands. NEPA embodies important and comprehensive policies designed to ensure that federal actions which might have significant environmental consequences, including private projects requiring government approval, not be undertaken until their adverse consequences have been analyzed and

ways to minimize them considered. The litigation below vindicated the purposes of both these Acts precisely as Congress intended. The litigation required government and industry to consider carefully the risks associated with the construction of the Trans-Alaska Pipeline and it required them to seek Congressional approval before diverting the irreplaceable public lands of Alaska to pipeline use. (Point II A 1).

The litigation had other concrete and substantial benefits. First, the preliminary injunction obtained in April 1970 by respondents, when neither industry nor government was prepared to deal with the complex problems of an Arctic pipeline, prevented a possible environmental and engineering disaster. Second, as government and industry spokesmen have acknowledged, the litigation served as a catalyst for their joint efforts to reduce the project's risks. Third, and most important, the litigation led to major legislation which set forth a completely new charter for pipelines crossing public lands and imposed detailed environmental, technological, and other safeguards on the Trans-Alaska Pipeline. In its brief, Alyeska labors to create the impression that following the court's decision in *Wilderness Society I*, Congress merely rubber-stamped the construction of the Trans-Alaska Pipeline. This contention is totally belied by Pub. L. No. 93-153, which is reproduced at Appendix C to this brief and summarized at pp. 51-54, *infra*. (Point II A 2).

The Congressional policies effectuated and the benefits conferred were the result of a massive private litigation effort undertaken by respondents with no prospect of receiving monetary damages. There was

a substantial disparity in the resources available to the respective parties in the litigation and the effort required of respondents placed a heavy burden on them and their counsel. (Point II A 3, 4).

The appropriateness of these considerations as factors to be weighed in deciding whether to shift fees from respondents is amply demonstrated by this Court's attorneys' fee decisions, this Court's decisions concerning judicial effectuation of Congressional policies and access to the courts, Congressional legislation on attorneys' fees, and by the attorneys' fees decisions of the lower federal courts. (Point II B).

The court of appeals' determination that it was fair and equitable in the circumstances of this case to shift a portion of respondents' fees *to* Alyeska was also correct. Alyeska argues that it had no legal obligation under the Mineral Leasing Act or NEPA, and that therefore the court was without power to award fees against it. As a technical matter the Mineral Leasing Act did impose an enforceable legal obligation on Alyeska. But more to the point, this Court's decisions establish that the power to shift fees does not depend upon the formality of a party's technical obligation. It rests on the inherent judicial power to do equity in a particular situation. (Point III).

The court's power to shift fees to Alyeska was properly exercised in the circumstances of this case. Alyeska is no mere bystander unfairly selected out to pay attorneys' fees. The Trans-Alaska Pipeline is Alyeska's project—conceived and proposed by Alyeska's principals to promote their private economic interests. The litigation itself resulted from actions

and decisions for which Alyeska's principals were directly responsible. It was Alyeska's principals who decided to address their application to the Secretary of the Interior rather than to Congress. They were free at any time to change their decision and address their request to the Congress, but they declined to do so even after receiving a clear signal from the preliminary injunction. It was also Alyeska's principals who sought approval of the pipeline without adequately considering major technological and environmental problems posed by the project. As the moving party behind an inadequately planned project contemplating an unauthorized use of public lands, Alyeska was the direct cause of this litigation and the real party in interest. (Point III A).

To protect the enormous economic interests of its principals, Alyeska played a major and active role in the litigation. Alyeska conducted extensive discovery, filed massive briefs, and took the major portion of defendants' oral argument in both the district court and the court of appeals. (Point III B). Furthermore, although Alyeska vigorously opposed respondents, Alyeska received concrete benefits from the litigation—primarily from the correction of basic technological deficiencies in the proposed pipeline that threatened its physical integrity. Alyeska's principals are also in a position to distribute the fee award among members of the public who are the ultimate beneficiaries of an improved pipeline, an improved environment, and a proper functioning of our governmental system. (Point III C). And the award does not otherwise work any hardship or unfairness on Alyeska. (Point III D-F).

Finally, Alyeska raises several miscellaneous contentions concerning the judicial manageability of fee awards and the appropriateness of awarding fees to attorneys who receive salaries from non-profit organizations. These contentions are refuted by the facts of this case and by judicial precedent. (Point IV).

ARGUMENT

I. THE EQUITABLE POWER TO AWARD FEES IS NOT CONFINED TO RIGID SETS OF CASES.

The decision below rests on the premise that the "Supreme Court has . . . indicated . . . that the equitable power of federal courts to award attorneys' fees . . . is not a narrow power confined to rigid sets of cases." *Wilderness Society II*, 495 F.2d at 1029. This Court's decisions clearly support that premise.

Over the years, the Court has approved non-punitive equitable awards of attorneys' fees in a variety of factual contexts which, taken together, have come to be known as the "common benefits" exception to the American rule.[50] Behind the label "common benefits" is a diverse group of cases in which particular facts

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[50] As formulated by the Court in *F. D. Rich Co.* v. *United States*, 417 U.S. 116 (1974), this exception to the American rule applies "where a successful litigant has conferred a substantial benefit on a class of persons and the court's shifting of fees operates to spread the cost proportionately among the members of the benefited class." *Id.* at 129-30.

The Court has, in addition, "long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly or for oppressive reasons." *Id.* at 129 and the cases collected at 129 n.17.

were found sufficient to support an equitable fee award. Indeed, what is now called the "common benefits" exception has itself developed from a simpler "common fund" doctrine to accommodate new equitable considerations.

The genesis of the exception was the recognition that it is basically unfair to require a litigant to bear the expense of a litigation from which others profit. This principle was recognized initially in a very narrow group of cases in which a "common fund" was protected, created, or recovered as a result of the litigation. *E.g., Central R.R. & Banking Co.* v. *Pettus*, 113 U.S. 106 (1885); *Trustees* v. *Greenough*, 105 U.S. 527 (1882). It was then recognized that the same considerations of fairness should be applied to a case which did not actually result in a fund, but produced a similar effect by establishing a precedent for others. *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 166 (1939). Recently, the Court has held that the benefits conferred upon others need not be pecuniary for the same considerations of fairness to apply. *Hall* v. *Cole*, 412 U.S. 1 (1973); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). In *Hall* and *Mills* the Court has also recognized that other equitable factors, not present in the common fund cases, may lend additional support for the shifting of fees. See p. 60 *infra*.

The ability to shift fees in a specific case depends, of course, on more than fairness to the plaintiff. There must exist, or there must be fashioned, an equitable fee shifting mechanism that is not unfair to others. Here, too, however, the Court has shown flexibility in approving mechanisms, which, even if

imperfect, reflect the specific circumstances of the case before it. In *Sprague*, *supra*, for example, no fund was actually established by the litigation. The Court recognized that any cost-spreading mechanism that might be devised would be imperfect since both secured and unsecured creditors would have to pay for it, even though only the former had benefited from the lawsuit. But the Court considered this as simply one factor to be considered "in the ultimate judgment . . . as to the fairness of making an award." 307 U.S. at 167.[51]

This Court's descriptions of the types of cases that might present sufficient equities to warrant the awarding of fees appear to have been carefully drafted so as to dispel any inference that the power to award fees for non-punitive reasons was somehow frozen within the mold of already decided common benefit cases.[52] In *Sprague*, the Court asserted that fee shift-

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[51] Following the remand, a fee was, in fact, awarded at the partial expense of non-benefitting general creditors by the district court. On appeal, the court of appeals upheld the equity of that award:

> "But if it was equitable to make the plaintiff whole for her expenses in establishing the lien, the District Court was warranted in concluding that the trivial disadvantage to the unsecured creditors was not a significant countervailing consideration." *Sprague* v. *Ticonic Nat'l Bank*, 110 F.2d 174, 177 (1st Cir. 1940).

[52] To have done otherwise would have been a startling departure from the manner in which equitable jurisdiction traditionally functions. As the Court recognized in *Sprague*:

> "As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power

ing is appropriate "in exceptional cases and for dominating reasons of justice." 307 U.S. at 167. In *Mills*, *supra*, the Court indicated that "both the courts and Congress have developed exceptions to this rule for situations in which overriding considerations indicate the need for such a recovery." 396 U.S. at 391-92. And in *Hall*, *supra*, the Court stated that "federal courts . . . may award attorneys' fees when the interests of justice so require" and that "federal courts do not hesitate to exercise this inherent equitable power whenever 'overriding considerations indicate the need for such a recovery'." 412 U.S. at 4-5.

Indeed, at the very time that the Court was endeavoring to control encroachments on the American rule in the context of everyday commercial litigation, it did not thereby freeze all future permissible exceptions to the rule into the precise mold of already-decided cases. While expressly reserving judgment "on the validity of the scope of that doctrine," the Court took note that "the lower courts have . . . applied a [private attorney general] rationale for fee shifting based on the premise that the expense of litigation may often be a formidable if not insur-

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will alone retain equity as a living system and save it from sterility." 307 U.S. at 167.

Compare, *Union P. Ry.* v. *Chicago R.I. & P. Ry.*, 163 U.S. 564, 601 (1896):

> "As has been well said, equity . . . 'has always preserved the elements of flexibility and expansiveness, so that new [remedies] may be invented, or old ones modified, in order to meet the requirements of every case' . . . ."

mountable obstacle to the private litigation necessary to enforce important public policies." *F. D. Rich*, *supra*, 417 U.S. at 130.[53]

Thus, the approach taken by the court below in looking to the "equities of this particular case" and not to some inflexible formula was fully consistent with this Court's decisions. The appropriateness of the court's award should be decided not on the basis of abstract predetermined formulas as Alyeska suggests but on traditional grounds of (1) whether the overriding equitable factors identified by the court support a shifting of fees *from* respondents in this case, and, if so, (2) whether it is fair and equitable in the circumstances of this case to shift those fees *to* Alyeska.

II. THE EQUITABLE FACTORS IDENTIFIED BY THE COURT SUPPORT A SHIFTING OF FEES FROM RESPONDENTS IN THIS CASE.

The court of appeals identified four equitable factors that in its judgment were sufficiently strong in "this particular case [to] support an award of attorneys' fees to the successful [respondents]." *Wilderness Society II*, 495 F.2d at 1036.

The equitable factors relied on were that the litigation had vindicated important Congressional policies; that it had conferred substantial benefits on others besides respondents; that massive litigation by respondents as private citizens was necessary to achieve those ends; and that the litigation, undertaken for

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[53] The lower court cases cited in *F. D. Rich*, 417 U.S. at 130 n.19, and other "private attorney general" cases are collected at note 91, *infra*.

no economic gain, placed heavy burdens on respondents and their counsel. Each of the factors cited by the court finds ample support in the record. Moreover, each of the factors was an appropriate one for the court to consider in deciding whether to authorize a shifting of fees from respondents in this case. Taken together, they demonstrate that the decision to shift fees from respondents rests upon unusually compelling considerations.

A. The Factors Identified by the Court Are Amply Supported by the Record

1. *The Statutory Interests Involved Were Important*

The court's conclusion that "vital statutory interests" were at stake in the litigation below is clearly correct. See *Wilderness Society II*, 495 F.2d at 1032.

As previously discussed, the Mineral Leasing Act was a landmark conservation measure designed to correct past abuses in public land management. When it enacted the law, Congress intended to reassert its own control over the use and disposition of the public lands. *Wilderness Society I*, 479 F.2d at 859-860, 864. The debates cited at length in the court of appeals' opinion demonstrate that "Congress seemed to be aware that the width limitation [imposed on pipeline rights-of-way] might . . . in the future prove to be . . . insufficient," but "Congress intended to maintain control over pipeline rights-of-way and *to force the industry* to come back to Congress if the amount of land granted was insufficient for its purposes." (Emphasis added). *Id.* at 860, 892. Under the scheme of the Act, Congress would

then have the opportunity to decide whether more public land should be granted and, if so, whether specific conditions and safeguards should be attached to its use.

Even if Congress had never enacted the National Environmental Policy Act of 1969, the case below would have been no "ordinary, run-of-the-mill litigation." See *Sierra Club* v. *Morton*, 405 U.S. 727, 755 (1972) (Mr. Justice Blackmun, dissenting). On a general level, as Justice Blackmun recently stated in an analogous context, "the propriety of the 'dual permit' device as a means of avoiding . . . [a] limitation imposed by Congress" presented an issue that "raise[d] important ramifications for the quality of the country's public land management." [34] More specifically, Alyeska's Trans-Alaska Pipeline proposal raised "significant aspects of a wide, growing, and disturbing problem, that is, the Nation's and the world's deteriorating environment with its resulting ecological disturbances." *Id.* at 755. The public lands

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[34] *Sierra Club* v. *Morton*, 405 U.S. 727, 757 (1972) (dissenting opinion). Significantly, the Congressional limitation contained in the Mineral Leasing Act was even stronger than that in issue in *Sierra Club*. As the court below noted:

> "We need not voice our views with respect to the Ninth Circuit's opinion in . . . . [*Sierra Club* v. *Hickel*, 9 Cir., 433 F.2d 24 (1970), *affirmed only on the ground of lack of standing to sue*, 405 U.S. 727 (1972)] . . . . [T]he statute involved in that case, 16 U.S.C. § 497 (1970), has no provision comparable to that in Section 28 of the Mineral Leasing Act expressly stating that no rights-of-way for the uses in question shall be granted except under the provisions, conditions and limitations of the statute." *Wilderness Society I*, 479 F.2d at 869-70.

that Alyeska selected for its pipeline are unique and irreplaceable. See Appendix A, *infra*. The project, however conceived and executed, will substantially and irretrievably alter their ecology and character for the rest of time. The preservation of Congress' right to protect these lands from needless degradation and to determine their most beneficial use was a matter of obvious national importance.

The importance of the environmental concerns that prompted the litigation below was confirmed and given concrete focus in 1969 when Congress passed the National Environmental Policy Act, the first and broadest of a series of federal statutes specifically designed to protect and restore the national environment.[55] NEPA was predicated on the recognition by Congress that:

> "As the evidence of environmental decay and degradation mounts, it becomes clearer . . . that the Nation cannot continue to pay the price of past abuse . . . .
>
> "If the United States is to create and maintain a balanced and healthful environment, new means and procedures to preserve environmental values in the larger public interest, to coordinate Government activities that shape our future environment, and to provide guidance and incen-

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[55] *See also* Noise Control Act of 1972, 42 U.S.C. § 4901 *et seq.* (Supp. II, 1972); Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1401 *et seq.* (Supp. II, 1972); Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 *et seq.* (Supp. II, 1972); Clear Air Amendments of 1970, 42 U.S.C. § 1857(a) *et seq.* (1970); Federal-Aid Highway Act of 1966, 23 U.S.C. § 138 (1970).

tives for State and local government and for private enterprise must be devised." [56]

In NEPA, Congress expressly declared that the Nation's goals include "fulfill[ing] the responsibilities of each generation as trustee of the environment for succeeding generations" and "attain[ing] the widest range of beneficial uses of the environment without degradation [and] risk to health or safety." [57] In recognition of the "critical importance of restoring and maintaining environmental quality to the overall welfare and development of man," [58] Congress established the "action-forcing" [59] procedures of Section 102(2)(c). These procedures are designed to ensure that federal actions which might have significant environmental consequences, including private projects requiring government approval, be delayed until their consequences have been analyzed and ways to minimize them considered.

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[56] S. Rep. No. 91-296, 91st Cong., 1st Sess. 5 (1969). *Compare President Nixon's Special Message to the Congress Outlining the President's 1972 Environmental Program*, 8 Pres. Doc. 218-19 (Feb. 8, 1972):

> "'[I]t is literally now or never' for true quality of life in America . . . . Environmental concern must crystallize into permanent patterns of thought and action. What began as an environmental awakening must mature finally into a new and higher environmental way of life."

[57] Section 101(b), 42 U.S.C. § 4331(b).

[58] Section 101(a), 42 U.S.C. § 4331(a).

[59] *Hearings on S. 1075, S. 237, and S. 1752 Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 116 (1969) (remarks of Senator Jackson).

NEPA's enactment leaves no doubt that "the commitment to improving and protecting our natural environment" is, as the court below held it to be, "among the most important" facets of "one of the most vital of current national policies." *Wilderness Society II*, 495 F.2d at 1034.[60] As applied to the proposed Trans-

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[60] Numerous other courts, including this Court, have acknowledged the national importance of environmental protection, and the major role to be played by NEPA in preventing environmental abuse. *E.g., United States* v. *SCRAP*, 412 U.S. 669, 693 (1973) (NEPA is a "major federal [effort] at reversing the deterioration of the country's environment"); *Sierra Club* v. *Morton*, 405 U.S. 727, 734 (1972) ("Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society"); *Environmental Defense Fund* v. *TVA*, 468 F.2d 1164, 1174 (6th Cir. 1972) (NEPA is a clear Congressional mandate recognizing "the obligation of all citizens" to incorporate environmental considerations into the decisionmaking process); *Arlington Coalition on Transp.* v. *Volpe*, 458 F.2d 1323, 1326 (4th Cir.), *cert. denied*, 409 U.S. 1000 (1972) ("It is the declared public policy of the United States to protect and preserve the national environment "to the fullest extent possible' "); *Lathan* v. *Volpe*, 455 F.2d 1111, 1116, 1121 (9th Cir. 1971) (NEPA is designed to implement "important public policies" and to prevent "environmental harm"); *National Helium Corp.* v. *Morton*, 455 F.2d 650, 656 (10th Cir. 1971) (National interests are protected by NEPA's requirement that agencies "assess environmental consequences in formulating policies"); *Scenic Hudson Preserv. Conf.* v. *FPC*, 453 F.2d 463, 473 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972) (full consideration and exploration of environmental factors is required by NEPA to ensure "the conservation of natural resources" and the "maintenance of natural beauty"); *Calvert Cliffs' Coord. Co* . v. *Atomic Energy Comm'n*, 449 F.2d 1109, 1122 (D.C.) ("The sweep of NEPA is extraordinarily broad, ... consideration of any and all types of environmental impact of federal action"); *Zabel*

Alaska Pipeline, the Mineral Leasing Act and NEPA fit together to provide a single, clear national objective and a set of mutually reinforcing procedural safeguards designed to protect the public lands of Alaska from unnecessary environmental degradation.

2. *The Benefits Conferred by the Litigation Were Substantial*

The court's conclusion that "concrete and . . . important benefits" resulted from the litigation is amply supported by the record. See *Wilderness Society II*, 495 F.2d at 1033.[61] These benefits furthered the objectives of both the Mineral Leasing Act and NEPA. They resulted from respondents' early recognition of the project's risks, respondents' perserverance in the litigation over a three-year period, and the ultimate success of respondents' efforts to compel Alyeska to go to Congress.

First, Alyeska was not prepared for pipeline-related construction in 1970 and respondents averted a possible environmental and engineering disaster by obtaining a preliminary injunction at that time. *Wilderness Society II*, 495 F.2d at 1033 n.3.

No one now disputes that "industry [had] seriously underestimated the real technical difficulties of the

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v. *Tabb*, 430 F.2d 199, 200 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971) (the preservation of our environment is an issue of "spectacular public importance").

[61] The court of appeals noted that the litigation below also produced other equally important, but less tangible, benefits relating to "the proper functioning of our system of government under the Constitution." *Wilderness Society II*, 495 F.2d at 1033.

task and failed to appreciate fully—particularly at the outset—the new conditions for decision-making in matters that substantially affect the environment. On its part, government was ill-equipped both institutionally and informationally for dealing with the complex problems of the pipeline." [62]

Alyeska's lack of preparedness threatened more than avoidable (and potentially massive) degradation of irreplaceable wilderness, wildlife, fish, and vegetation. A major miscalculation on any one of a broad range of environmental problems (permafrost, erosion, earthquakes, river scour, flooding) threatened "*the physical integrity of the pipeline itself.*" [63] By definition, averted potential disasters cannot be quantified. But in the present case, the risk of going ahead on a piecemeal basis—as was contemplated in 1970—was clearly significant. And, in a very real sense, respondents' early intervention helped to save Alyeska's principals not only from their own errors but from direct, substantial and potentially irrecoverable economic loss.[64]

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[62] Address by the Honorable Russell E. Train to the Joint Judicial Conference of the Eighth and Tenth Circuits, June 29, 1973, quoted at *Wilderness Society II*, 495 F.2d at 1033-34 n.3.

[63] *See* Address by Russell E. Train, *supra*:

"If the pipeline had been constructed using the original design specifications, it would very likely have resulted in not only very serious environmental damage but also serious operational problems. Indeed, the physical integrity of the pipeline itself was very much at stake." *Ibid.*

[64] As Administrator Train has explained:

"[T]he case of the Alaska pipeline has not been simply one of aesthetics, or of concern over wildlife and wilder-

Second, once the preliminary injunction was issued, the litigation served as a catalyst for the joint efforts of industry and government to reduce the project's risks. *Wilderness Society II*, 495 F.2d at 1034-35.

The process that culminated in Congress' authorization of the Trans-Alaska Pipeline was, as Administrator Train has characterized it, "one of learning for both industry and government." [65] The reduction

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ness disturbance, or worries over water pollution, important as all of these are. It was clearly an example where sound environmental analysis was essential to sound engineering and siting." *Ibid.* *See* p. 7 *supra*.

Former Secretary of the Interior Hickel has been quoted as asserting that Alyeska's principals initially brought a "temperate zone mentality" to Alaska, reckoning that what they had done in Oklahoma they could do just as well in Alaska. His conclusion, while stated in blunter terms, mirrors that of Mr. Train: "It wouldn't have just been an environmental disaster, it would have been an engineering disaster." *The Alaska Pipeline*, Smithsonian (Vol. 5, No. 7) 38, 42 (October 1974). *Compare* Statement of Alaska State Pipeline Coordinator Chuck Chapman, quoted in *Alaska Construction & Oil* 24 (June 1974) ("In 1969 when . . . TAPS [Trans-Alaska Pipeline System] wanted to build the pipeline, they hadn't done their homework.").

[65] Address by Russell E. Train, *supra*, note 62.

A quick insight into the progression of that process can be gained if the Court were to *compare* the sketchy papers that accompanied Alyeska's principals' initial application, Rule 9(h) Documents, Tab B (R. 152) *with* the 29-volume Project Description ultimately submitted (Ad. Rec. 1.1.2.3) (R. 239) and *compare* the Interior Department's Final Impact Statement on the project (Ad. Rec. 2.14) (R. 239) *with* the Department's earlier efforts—the eight-page document dated March 20, 1970, titled "Environmental Statement Yukon

in risk that resulted from this process was cited by Congress as a determinant factor in its decision to authorize the project. See legislative history cited at pp. 26-28 *supra*.

Some of the more significant changes that reduced the project's risks can be summarized briefly. Alyeska's principals originally proposed to bury all but five percent of the line. The consequence would have been the thawing of permafrost to such an extent that resulting pressures on the pipe would have caused numerous ruptures. As now conceived, more than 300 miles of pipeline that were originally to be buried will now be above ground. Alyeska's principals similarly planned to cross all rivers by burying the pipe beneath river beds. If they had done so, numerous hydrologic hazards would have threatened the integrity of the pipeline. Current design plans now call for several overhead crossings.

The delay in project start-up also permitted both Alyeska and the government to undertake detailed geologic, soils, and engineering studies on many aspects of the environment that resulted in a safer pipeline design. Because of these studies, there have been numerous changes in the alignment of the route to avoid hazardous areas that the original route would have traversed. Other substantial risk reduction measures include a specialized elevated seismic design to carry the pipeline over the Denali Fault Zone[66]

River - North Slope Road" (P. Docs. I, Tab K) (R. 207) and the descriptive document dated January 15, 1971, titled "Draft Impact Statement" (Ad. Rec. 2.13) (R. 239).

[66] This is a major fault zone on which there has been extensive surface displacement over time.

and the development of specialized devices to permit safer pipeline burial in permafrost.[67]

Obviously many factors contributed to the development of an environmentally and technologically safer pipeline project. But both government and industry alike have acknowledged that this litigation played an important role in the process. On several occasions Secretary Morton asserted that his Department's efforts were responsive to issues raised in the litigation:

> "We are under an injunction not to issue a permit . . . . [B]efore we go to court we better look at the whole work . . . ."[68]
>
> * * * *
>
> "[W]e are taking as thorough a process as we can, definitely involving the best talents we can develop within the Government and without the Government as consultants to go at this job so that when we make a decision it will be a decision that has all of the criteria to back it up. The matter then will be an easier matter for the courts to decide."[69]

Indeed, Secretary Morton concluded his deposition in this case with an expression of appreciation for respondents' efforts:

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[67] See Ad. Rec. 1.1.2.3 (R. 239).

[68] Statement of Secretary Morton, Press Conference, October 4, 1971, P. Docs. II, Tab G, p. 30 (R. 207).

[69] Statement of Secretary Morton, *Hearings on S. 35, S. 835, and S. 1571 Before the Senate Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess., pt. 2, 455 (April 29, 1971); P. Docs. II, Tab D, p. 455 (R. 207).

> "I want to thank all of you. I think it is just going through all of this that we are going to have a better world. I am for it." [70]

And the president of one of Alyeska's major principals, in testimony before the Senate Committee on Interior and Insular Affairs, candidly admitted:

> "We have learned from the environmentalists. I think it is perfectly true to say we can build a better line today, a better and more environmentally safe line today, because of the intervention of the environmentalists than we could have built 4 years ago." [71]

Third, and most significant, the result of respondents' success in "forcing Alyeska to go to Congress" was the imposition by Congress of "important new requirements" which "protect the public interest" and

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[70] Deposition of Secretary Morton, June 24, 1972, pp. 71-72 (R. 225).

[71] Statement of Thornton F. Bradshaw, President, Atlantic Richfield Co., *Hearings on S. 1040, S. 1041, S. 1056, S. 1081 Before the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess., pt. 2, at 383 (1973). *Accord*, Interview with Governor William A. Egan of Alaska, *Alaska Construction & Oil Report* 48 (February 1971) ("the hue and cry, as they called it in the beginning, may have been a blessing in disguise for the long-range operations of this kind of development"). *Compare Scenic Hudson Preserv. Conf. v. FPC*, 453 F.2d 463, 481 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972):

> "The petitioners performed a valuable service in that earlier case, and later before the Commission. By reason of their efforts the Commission has reevaluated the entire Cornwall project. The modifications in the project reflected a heightened awareness of the conflict between utilitarian and aesthetic needs."

reflect the environmental, technological, and other concerns that prompted the litigation below. *Wilderness Society I*, 495 F.2d at 1033.

In its brief, Alyeska labors to create the impression that following the court's decision in *Wilderness Society I* Congress made "a legislative finding that the Department's efforts were fully adequate" and quickly rubber-stamped the construction of the Trans-Alaska Pipeline by simply removing the previous width limitation. See P. Br. 35. This is simply untrue. Although there were those urging that the national interest required the immediate commencement of pipeline construction, Congress spent ten months conducting hearings, deliberations and debate, in order to assure careful consideration of the merits of the pipeline proposal. Most significantly, the end result of this process, Pub. L. No. 93-153 (Appendix C, *infra*), contains on its face the best evidence of the concrete and substantial benefits of the litigation and the importance that Congress placed on the concerns that it raised.

Thus, Title I sets forth a completely new charter for pipelines crossing public lands. Explicit "Pipeline Safety" (Section 28(g)) and "Environmental Protection" (Sec. 28(h)) requirements—including requirements "designed to control or prevent (i) damage to the environment (including damage to fish and wildlife habitat, (ii) damage to public or private property and (iii) hazards to public health and safety"—have now for the first time been imposed on such pipelines by Congress. The Secretary of the Department of Transportation is now required to "cause the examination of all pipelines and associated fa-

cilities on Federal lands" and to "cause the prompt reporting of any potential leaks or safety problems" (Section 28(w)(3)); provisions are made for the suspension or termination of rights-of-way for failure to comply with the Act's requirements (Section 28(o)); and annual reports are required from the Secretary of the Interior on the "safety and environmental requirements imposed" by the Act (Section 28(w)(1)) and from the Secretary of the Department of Transportation on "any potential dangers of or actual explosions, or potential or actual spillage on Federal lands" (Section 28(w)(4)).

Significantly, the new Act reflects much the same concern for public land use that prompted the restrictive width limitation of its predecessor and does not simply confer unfettered discretion on the Secretary. Thus, Congress retained the fifty foot right-of-way limitation "unless the Secretary or agency head finds, *and records the reasons for his finding*, that in his judgment a wider right-of-way is *necessary* for operation and maintenance after construction, or to protect the environment or public safety" (Section 28(d)) (emphasis added). The Act requires the Secretary "to notify the House and Senate Committees on Interior and Insular Affairs promptly upon a receipt of an application for a right-of-way for a pipeline twenty-four inches or more in diameter" and to refrain from issuing permits for such pipelines until those Committees have an opportunity to act (Section 28(w)(2)).

Moreover, the Act explicitly adopts the principle of one of the key arguments in respondents' NEPA brief concerning the desirability of common corridors

for oil and gas pipelines. See p. 21 n. 36 *supra*. It provides that "[i]n order to minimize adverse environmental impacts and the proliferation of separate rights-of-way across Federal lands, the utilization of rights-of-way in common shall be required to the extent practical" (Section 28(p)). Moreover, "[i]n order to minimize adverse environmental impacts and to prevent the proliferation of separate rights-of-way across Federal lands" the Act requires the Secretary of the Interior to "review the need for a national system of transportation and utility corridors across Federal lands and submit a report of his findings and recommendations to the Congress and the President by July 1, 1975" (Section 28(s)).

The environmental and other safeguards imposed on the construction of the Trans-Alaska Pipeline in Title II of the Act are similarly far-reaching. The "[r]ights-of-way, permits, leases and other authorizations" to be issued to Alyeska are expressly made subject to the various environmental and technological safeguards of Title I (Section 203(c)).[72] Strict liability has been imposed on Alyeska for "damages in connection with or resulting from activities along or in the vicinity of the . . . right-of-way" (Section 204(a)(1)). Specifically, "[i]f any area within or without the right-of-way . . . is polluted . . . and such pollution damages or threatens to damage aquatic life, wildlife, or public or private property, the control and total removal of the pollutant shall be the expense of [Alyeska]" (Section 204(b)); there shall be strict liability "without regard to fault in accordance with the provisions of this subsection

[72] With the exception of subsections (h)(1), (k), (q), (v)(2), and (x).

for all damages, including clean-up costs, sustained by any person or entity, public or private, including residents of Canada, as the result of discharges of oil from . . . vessel[s]" transporting pipeline oil (Section 204(c)(1)); and Alyeska is now obligated by law to maintain a $100,000,000 liability fund to satisfy claims (Section 204(c)(5)).

Finally, specific provisions are also included in the Act relating to vessel construction (Section 401) and vessel traffic control (Section 402) for the sealeg portion of the system.

3. *Private Enforcement Was Required To Vindicate the Statutory Interests and Confer the Benefits Identified by the Court*

The court of appeals concluded that this was a case where the effectuation of the statutory interests and the conferral of the benefits described above "depend[ed] on the diligence of private attorneys general and their willingness to bring suit." *Wilderness Society II*, 495 F.2d at 1034. Alyeska speculates that the "beneficial results" cited by the court "might have occurred" without respondents' lawsuit. P. Br. 11, 36-42.[73] But the record clearly supports the court's decision to the contrary.[74]

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[73] Alyeska's Brief is contradictory on this point. On the one hand, Alyeska argues that even without the litigation pipeline construction would not have started until full environmental studies were undertaken and that these studies would have been done without respondents' litigation. P. Br. 36-42. On the other hand, Alyeska argues that beginning in 1970 respondents caused a three-year delay in the pipeline's construction by their litigation seeking environmental studies. P. Br. 38. Alyeska cannot have it both ways.

[74] Alyeska now apparently seeks full-blown formal "hearings" on the causation issue. P. Br. 42. But Alyeska never

Obviously, there can be no dispute that private enforcement was essential to assure that the objective of the Mineral Leasing Act's width limitation was fulfilled. This case was one, not unique in our history, where government officials were willing to acquiesce in an unauthorized private use of public lands. Even after the clear warning of the preliminary injunction, Alyeska and the Government were determined to go forward with the pipeline project without seeking Congressional approval. As the court below so vividly described the situation: "These companies have now come into court, accompanied by the executive agency authorized to administer the statute, and have said, 'This is not enough land, give us more'." *Wilderness Society I*, 479 F.2d at 891.

Since Alyeska was unwilling to observe and the Government was unwilling to enforce Congressional land use policy, private enforcement of the law was necessary. And no one can deny that the new environmental, technological, and land use safeguards imposed by Pub. L. No. 93-153, on all future pipelines crossing public lands as well as on the Trans-Alaska Pipeline, are the direct consequence of respondents' success in the court of appeals. Without that success clearly there would have been no Pub. L. No. 93-153.

Insofar as the complementary objectives of NEPA were concerned, it is indisputable that in 1970 Gov-

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requested such hearings before the court of appeals and never expressed any dissatisfaction with the procedures that court used in ruling on respondents' Bill of Costs. In fact, the procedure followed by the court was both fair and workable, and afforded Alyeska the unfettered opportunity to present all of its causation arguments.

ernment and industry were prepared to proceed on a piecemeal basis with the construction of the Trans-Alaska Pipeline without having evaluated the grave potential risks to the environment and to the physical integrity of the pipeline entailed in such an approach. The district court determined at that time that irreparable injury was the likely result of that course of action. *Wilderness Society* v. *Hickel*, 325 F. Supp. at 424. For a considerable time thereafter —as evidenced by the wholly inadequate "Draft Impact Statement" of January 1971 prepared with Alyeska's assistance—government and industry working together were still not doing the job. In short, continued private citizen action was necessary as it has proved necessary in other environmental matters.

The need for private enforcement of Congressional environmental policy is widely recognized. In its second annual report the Council on Environmental Quality stated:

> "Perhaps the most striking recent legal development has been the step-up in citizen 'public interest' litigation to halt degradation of the environment. In the face of a history of administrative decisions that ignored environmental impacts and against a tide of legislative delays in developing pollution control law, citizens concluded that they must use the courts to cure the neglect. The citizen litigation has not only challenged specific government and private actions which were environmentally undesirable. It has speeded court definition of what is required of Federal agencies under environmental protection statutes. The suits have forced greater sensitivity in both government and industry to environmental considerations. And they have educated lawmakers and the public to the need for new environmental legislation." *Second Annual Report*, 155-56 (1971)

[Footnote continued on page 57]

4. *The Litigation Placed Heavy Burdens on Respondents and Their Counsel*

Finally, the record also clearly supports the court's characterization of the litigation below as one "of monumental proportions" that placed a "heavy burden" on respondents. *Wilderness Society II*, 495 F.2d at 1036.

Here, as in *Bradley* v. *Richmond School Board*, 416 U.S. 696, 718 (1974), there was substantial "disparity in the respective abilities of the parties adequately to present and protect their interests." Respondents were required to match their modest financial resources against the enormous resources of the Federal Government and a consortium of large oil companies.[76] *Compare Bradley* v. *Richmond School Board*, 416 U.S. at 718 n.25 (" 'Ranged against the

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[Continued]

The need for private enforcement has also been recognized by Congress in the Clean Air Amendments of 1970 and the Federal Water Pollution Control Act Amendments of 1972, both of which specifically provide for citizen suits and for attorneys' fees awards to facilitate such suits. 42 U.S.C. § 1857h-2(d) (1970); 33 U.S.C. § 1365(d) (Supp. II, 1972). *See* pp. 65-66, *infra*.

[76] The seven beneficial owners of Alyeska constitute, respectively, the second (Exxon), sixth (Mobil), twenty-second (ARCO), thirty-seventh (Phillips), fiftieth (Union), eighty-sixth (Sohio), and eighty-ninth (Amerada-Hess) largest corporations by net sales in the United States. 1974 *National Petroleum News Factbook* 29. (Ranked according to the *Fortune* directory of the 500 largest industrial corporations, May 1973.) Their distinguished counsel in the litigation below and before this Court is the large and prestigious law firm of Steptoe & Johnson. *See Martindale-Hubbell Law Directory*, vol. 1, 2954B-2959B (1974).

plaintiffs have been the legal staff of the City Attorney's office and retained counsel highly experienced in trial work . . . . Few litigants—even the wealthiest—come into court with resources at once so formidable and so suited to the litigation task at hand . . . .' "); *La Raza Unida* v. *Volpe*, 57 F.R.D. 94, 101 (N.D. Cal. 1972) ("the average . . . litigant must hesitate, if not shudder, at the thought of 'taking on' an entity such as the California Department of Highways, with no prospect of financial compensation for the efforts and expenses rendered"); *NAACP* v. *Allen*, 340 F. Supp. 703, 710 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974) (" 'an enterprise on which any private individual should shudder to embark' ").

Extensive factual discovery, expert scientific analysis, and legal research on a broad range of technological, environmental, and land use questions were required to produce "a record and set of briefs commensurate with the multi-billion-dollar project at stake." *Wilderness Society I*, 479 F.2d at 846. The preparation and presentation of the record, briefs, and oral argument that served as the basis of the court of appeals' decision in *Wilderness Society I* consumed over 4,500 hours of attorneys' time, not to mention the substantial effort (amounting to several hundred man-hours) expended by volunteer legal interns and clerical staff. A full description of the efforts undertaken in this regard is contained in the *Affidavit of Counsel* attached to the Bill of Costs at Jt. App. 213-19.

The court of appeals noted that "[t]his burden was assumed not in the hope of obtaining a monetary

award." *Wilderness Society II*, 495 F.2d at 1032. And it was in fact carried out under heavy constraints imposed by respondents' modest budgets. See *Affidavit of Counsel, supra.* Obviously, therefore, the burden of this litigation posed a particularly formidable obstacle to the beneficial results it produced. And, as the court declared:

> "In such cases, '[i]f successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.' Newman v. Piggie Park Enterprises, Inc., . . . 390 U.S. at 402 . . . . Where the law relies on private suits to effectuate congressional policy in favor of broad public interests, attorneys' fees are often necessary to ensure that private litigants will initiate such suits. *See* Lee v. Southern Home Sites Corp., . . . 444 F.2d at 145."[11]

B. The Factors Identified by the Court Are Appropriate Factors in Determining Whether To Shift Fees.

The appropriateness of the factors which guided the fee award in the present case is amply demonstrated by this Court's attorneys' fees decisions, this Court's decisions concerning judicial effectuation of Congressional policies and access to the courts, Congressional legislation on attorneys' fees, and the attorneys' fees decisions of lower federal courts.

Just last Term, this Court recognized that "the expense of litigation may often be a formidable if not insurmountable obstacle to the private litigation necessary to enforce important policies." *F. D. Rich Co.*

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[11] *Wilderness Society II*, 495 F.2d at 1030.

v. *United States*, 417 U.S. at 130. Thus, this Court is aware that at least in some cases private enforcement of Congressional policies requires a mechanism which mitigates the costs of litigation. The factors relied upon by the court of appeals are appropriate because they serve precisely this function. These factors describe "overriding considerations" which justify a fee award in "the interests of justice." *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. at 391; *Hall* v. *Cole*, 412 U.S. at 5.

This Court's attorneys' fees decisions in "common benefit" cases have made clear that where a litigant produces benefits to others, a fee award may be appropriate. As part of the evolution of the "common fund" exception into a "common benefits" exception, the Court in both *Mills* and *Hall* recognized that there is an added reason for shifting fees, not previously alluded to in the earlier cases, when the benefits conferred by the litigation effectuate Congressional policy. In *Mills*, the Congressional policy effectuated was that of "fair and informed corporate suffrage." 396 U.S. at 396. In *Hall*, it was the Congressional policy "that all union members be guaranteed at least 'minimum standards of democratic process . . . .'" 412 U.S. at 7.

As a corollary, the Court noted in *Hall* that when the litigation effectuates Congressional policy, fee shifting is appropriate because it will affirmatively facilitate such litigation. The Court recognized the "'unescapable fact'" that when the effectuation of Congressional policy depends upon private enforcement, litigation expenses serve as a barrier to that enforcement. In such cases, effective implementation

may depend on the ability of courts to fashion an equitable mechanism for the shifting of fees.[78]

In analogous areas, the Court has emphasized that courts have a responsibility to exercise their equitable powers to facilitate the private enforcement of Congressional statutes. As the Court has explained, "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964).[79] Because government enforcement resources are limited and because sometimes the government does not correctly follow the law, private parties must often be relied upon to enforce the law. *E.g., Trafficante* v. *Metropolitan Life Insurance*

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[78] To deny attorneys' fees, the Court concluded:

> "'[W]ould be tantamount to repealing the Act itself by frustrating its basic purpose. It is difficult for individual members of labor unions to stand up and fight those who are in charge. The latter have the treasury of the union at their command and the paid union counsel at their beck and call while the member is on his own . . . . An individual union member could not carry such a heavy financial burden. Without counsel fees the grant of federal jurisdiction is but a gesture for few union members could avail themselves of it.'" 412 U.S. at 13, quoting court of appeals opinion, 462 F.2d 777, at 780-81.

[79] *See generally Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 414 n. 13 (1968); *Bell* v. *Hood*, 327 U.S. 678, 684 (1946). This Court has noted that equity courts have particularly broad powers to mold remedies when public interests as opposed to mere private interests are involved. *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946); *United States* v. *Morgan*, 307 U.S. 183, 194 (1939); *Virginian Ry.* v. *System Fed'n*, 300 U.S. 515, 552 (1937).

Co., 409 U.S. 205, 211 (1972) and cases cited; *see Associated Industries* v. *Ickes*, 134 F.2d 694, 704 (2d Cir.), *vacated on other grounds*, 320 U.S. 707 (1943). Thus, this Court has not hesitated to imply a private right of action to facilitate the enforcement of federal statutes which were merely declarative of certain rights,[50] or which on their face provided only for enforcement by the government.[51] In many circumstances, the Court has implied a right to compensatory damages where the statute failed to provide for any.[52] In short, the court of appeals was on traditional ground when it provided an equitable remedy in order to facilitate private enforcement necessary to effectuate Congressional policies.

Other cases in this Court have long recognized both the significance of access to the courts and the reality of economic burdens to litigation. For example, this Court has granted citizen groups access to the courts through decisions on standing.[53] It has held that access to the courts must be protected because litiga-

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[50] *E.g.*, *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 414 n.13 and cases cited (1968); *cf. Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

[51] *See, e.g.*, *Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969); *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964).

[52] *Wyandotte Transp. Co.* v. *United States*, 389 U.S. 191, 202, 204 (1967); *Mitchell* v. *Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 296 (1960); *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192, 207 (1944); *Texas & P. Ry.* v. *Rigsby*, 241 U.S. 33, 39-40 (1916); *J. I. Case Co.* v. *Borak*, *supra*; *cf. Bivens* v. *Six Unknown Fed. Narcotics Agents*, *supra*.

[53] *E.g.*, *United States* v. *SCRAP*, 412 U.S. 669 (1973). *See also Office of Comm'n of United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966).

tion is frequently more than "a technique of resolving private differences." [54] And in numerous decisions, it has struck down economic burdens to litigation or mitigated the impact of those burdens.[55] These cases demonstrate that the court of appeals properly considered, as one factor justifying the fee award in the present case, that it would relieve economic burdens which make access to the courts more difficult.

Congressional legislation on attorneys' fees provides additional support for the factors relied upon by the court of appeals. These expressions of Congressional policy are significant because, as the Court noted in *Mills*, both court-developed and Congressionally-developed fee awards rest upon the same basic determination that "overriding considerations indicate the need for such a recovery." 396 U.S. at 391-92. In determining how to exercise their equitable powers, courts have traditionally been guided by Congressional policy determinations:

> "This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in

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[54] *NAACP* v. *Button*, 371 U.S. 415, 429-30 (1963), *see also California Motor Transp. Co.* v. *Trucking Unltd.*, 404 U.S. 508 (1972).

[55] *E.g.*, *Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Johnson* v. *Avery*, 393 U.S. 483 (1969); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). It has been noted that one main purpose of the Federal Rules concerning discovery is to simplify litigation and thereby eliminate some of its costs. *Developments—Discovery*, 74 Harv. L. Rev. 940, 945 (1961).

matters of statutory construction but also in those of decisional law." [*]

The Congressional policy with regard to the award of fees in appropriate cases is reflected in many statutes. For example, this Court recognized in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), that the fee provisions of Title II of the Civil Rights Act of 1964 were premised on the recognition that there were economic barriers to the effectuation of Congressional policies through private litigation. As the court noted in *Newman*:

> "When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking

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[*] *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 390-91 (1970); *see also Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971). It is, of course, by now well settled that Congress' action in specifically providing for fee awards to effectuate some statutes hardly precludes the courts from exercising their own powers in connection with other statutes. Indeed, this Court has specifically held that in situations where Congress has specifically made provisions for the award of fees in some titles of statutes but not others, courts are not precluded from exercising their equitable power to award fees with regard to the latter. *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. at 390-91; *Hall* v. *Cole*, 412 U.S. at 10-11.

the injunctive powers of the federal courts." 390 U.S. at 402.

Another example is the recently passed amendment to the Freedom of Information Act. In explaining why the courts should assess reasonable attorneys' fees against the United States in productive cases, the Senate report stated:

> "Too often the barriers presented by court costs and attorneys' fees are insurmountable for the average person requesting information, allowing the government to escape compliance with the law . . . The necessity to bear attorneys' fees and court costs can thus present barriers to the effective implementation of national policies expressed by Congress in legislation." [32]

The Clean Air Amendments of 1970, 42 U.S.C. § 1857h-2(d), and the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1365(d) provide particular guidance for the present case because both involve environmental policies. In specifically providing for a private right of action under both statutes, Congress recognized that private enforcement was necessary to effectuate these nationally important environmental policies.[33] Moreover, both

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[32] *See also Bradley* v. *Richmond School Bd.*, *supra*, 416 U.S. at 719; *Northcross* v. *Memphis Bd. of Educ.*, 412 U.S. 427, 428 (1973).

[33] S. Rep. No. 93-854, 93d Cong., 2d Sess. 17-18 (1974).

[34] S. Rep. No. 91-1196, 91st Cong., 2d Sess. 36-39 (1970) (Clean Air Amendments); S. Rep. No. 92-414, 92d Cong., 1st Sess. 79-82 (1971) (Federal Water Pollution Control Act Amendments); H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 132 (1972) (Federal Water Pollution Control Act Amendments).

Acts specifically provide for attorneys' fees. Since only injunctive relief is generally available under each statute, significant economic obstacles may stand in the way of private enforcement. Thus, the Congressional committees which reported out the attorneys' fees provisions in each statute stated that "in bringing legitimate actions . . . citizens would be performing a public service and in such instances the courts should award costs of litigation to such party." [30]

In short, the factors relied upon by the court of appeals were the same factors identified by Congress in legislation providing for fee shifting.

Finally, the appropriateness of the factors guiding the fee award in the present case is supported by the decisions of numerous lower courts which have relied upon these same factors in granting non-statutory fee awards in other so-called "private attorney general" cases. Respondents do not assert that the results reached in the particular circumstances of all these cases were necessarily correct. But the factors which underlie many of these fee awards reflect the same considerations which guided the court below.

In particular, these lower federal courts, which have a day-to-day working knowledge of the realities of litigation, have found that there are substantial economic obstacles to certain private litigation which vindicates Congressional policies and confers benefits on others beside the litigant. They have recognized that fee awards may be appropriate in such

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[30] S. Rep. No. 91-1196, 91st Cong., 2d Sess. 38 (1970) (Clean Air Amendments); S. Rep. No. 92-414, 92d Cong., 1st Sess. 81 (1971) (Federal Water Pollution Control Act Amendments).

cases because, without the prospect of recovering fee awards, worthy and productive litigation may be unjustifiably discouraged.[21]

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[21] Leading cases in the courts of appeals which have followed a private attorney general theory in making a fee award include: *Knight* v. *Auciello*, 453 F.2d 852 (1st Cir. 1972) (fee awarded in Section 1982 civil rights case to "remove the burden from the shoulders of the plaintiff seeking to vindicate the public right"); *Hoitt* v. *Vitek*, 495 F.2d 219 (1st Cir. 1974) (fee awarded in Section 1983 prisoner rights case "to encourage important policy enforcement"); *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971) (fee awarded in Section 1982 civil rights case "[t]o ensure that individual litigants are willing to act as 'private attorneys general' to effectuate the public purposes of the statute"); *Cooner* v. *Allen*, 467 F.2d 836 (5th Cir. 1972) (fee may be awarded in Section 1981 civil rights case for the reasons discussed in *Lee*, *supra*); *Fairley* v. *Patterson*, 493 F.2d 598 (5th Cir. 1974) (fee awarded in Fourteenth Amendment reapportionment case where "private plaintiffs have aided in effectuating important congressional and public policies"); *Cornist* v. *Richland Parish School Bd.*, 495 F.2d 189 (5th Cir. 1974) (fee awarded in Section 1983 civil rights case where plaintiffs' attorneys "benefited not only [plaintiffs] but all the black teachers in the Parish as well as the school system as a whole by virtue of the system's being brought into compliance with federal law and Congressional policy"); *Taylor* v. *Perini*, 503 F.2d 899 (6th Cir. 1974) (on authority of *Wilderness Society II*, fee may be awarded in Section 1983 prisoner rights case "where there is no potential substantial award of damages and where the cost of supporting a case for injunctive relief is high" because such an award "serves to prevent the unjust discouragement of parties in bringing suit to vindicate important rights"); *Donahue* v. *Staunton*, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973) (fee awarded in Section 1983 free speech case because the "relative financial positions of the parties" were disparate and the "benefit to the general public . . . is substantial in

III. THE EQUITABLE FACTORS PRESENT IN THIS CASE SUPPORT A SHIFTING OF RESPONDENTS' FEES TO ALYESKA.

Having concluded, for the reasons set forth in Point II, *supra*, that respondents and their counsel

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this case and should not depend for its protection upon the financial status of the individual" deprived of his rights); *Fowler* v. *Schwarzwalder*, 498 F.2d 143 (8th Cir. 1974) (fee may be awarded in Sections 1981 and 1983 civil rights case since "absent compelling circumstances," a "'private attorney general' . . . seeking to vindicate Congressional policy of the highest priority and advance the public interest should not be forced to bear the costs of litigation"); *Brandenberger* v. *Thompson*, 494 F.2d 885 (9th Cir. 1974) (fee awarded in Section 1983 right to travel welfare case because plaintiff "benefitted a significant class," "vindicated [a] federally protected right," had an insufficient monetary interest "to provide an incentive to bring the suit," and could not rely upon the state attorney general to protect her right); *cf. Stolberg* v. *Members of Bd. of Trustees for State Colleges*, 474 F.2d 485 (2d Cir. 1973) (fee awarded in Section 1983 case not because "defendants should suffer pecuniary punishment," but rather "to assure that the plaintiff, and others who might similarly be forced to great expense to vindicate clear constitutional claims, are not deterred from securing such vindication by the prospect of costly, protracted proceedings which have become necessary only because of the obdurate conduct of the defendants").

Apparently, only the Fourth Circuit has rejected this approach, *Bradley* v. *Richmond School Bd.*, 472 F.2d 318 (1972), and that decision was reversed by this Court on other grounds, 416 U.S. 696 (1974). Recently in *Sierra Club* v. *Lynn*, 502 F.2d 43 (1974), the Fifth Circuit reaffirmed the private attorney general rationale but declined to apply it. *See* pp. 78-80 *infra*.

District court cases include the following: *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972) (fees awarded in Section 1983 reapportionment suit "to

should not be required to bear the entire burden of this litigation, the court determined that, as between respondents and Alyeska, the equities of this case supported a shift of at least part of respondents' fees

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eliminate [financial] impediments to *pro bono publico* litigation" which benefitted plaintiffs' class and effectuated a strong congressional policy); *La Raza Unida* v. *Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972) (fee awarded in environmental protection and housing assistance case brought under the Department of Transportation Act of 1966 and various federal housing statutes, because of "the strength of the Congressional policy, the number of people benefitted by the litigants' efforts, and the necessity and financial burden of private enforcement"); *Lyle* v. *Teresi*, 327 F. Supp. 683 (D. Minn. 1971) (fee awarded in Section 1983 civil rights case "to encourage individuals injured by racial discrimination to seek judicial relief"); *NAACP* v. *Allen*, 340 F. Supp. 703 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974) (fee awarded in Section 1983 civil rights case because "the benefit accruing to plaintiffs' class is substantial and important," because plaintiffs "promoted the purposes of congressional legislation," and because such cases usually require "substantial financial sacrifices" and may cause the lawyer to suffer "community ostracism"); *Harper* v. *Mayor and City Council*, 359 F. Supp. 1187 (D. Md. 1973) (fee awarded in civil rights case brought under several statutes because "[p]laintiffs have effectuated a strong congressional policy by maintaining this suit"); *Incarcerated Men* v. *Fair*, 376 F. Supp. 483 (N.D. Ohio 1973) (fee awarded in Section 1983 prisoner rights case to "assure that the vindication of public constitutional rights need not depend upon the financial resources of the particular individuals who seek to secure those rights"); *Newman* v. *Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972) (fee awarded in case vindicating prisoners' constitutional rights because plaintiffs "benefited substantially a large class of others in the same manner as they have benefited themselves"); *Wyatt* v. *Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972), *appeal pending* (fee awarded in suit vindicating mental patients' right to treatment because

to Alyeska. *Wilderness Society II*, 495 F.2d at 1036. The court clearly stated in its opinion that its decision to shift a portion of respondents' fees to Alyeska

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the expenses "incurred in vindicating the public good were considerable," the litigation benefited large numbers of people, and fee shifting is necessary "in order to eliminate the impediments to *pro bono publico* litigation"); *Jinks* v. *Mays*, 350 F. Supp. 1037 (N.D. Ga. 1972) (fee awarded in Section 1983 employment rights/maternity leave case since a "substantial and important" benefit was conferred upon a class and "such litigation must be encouraged to vindicate the federal rights of our citizens"); *Stanford Daily* v. *Zurcher*, 366 F. Supp. 18 (N.D. Cal. 1973) (fee awarded in Section 1983 search and seizure case because "no remedial action can be expected from public officials," "fee shifting is necessary to insure the vindication of important constitutional rights," "because it is consistent with a remedy increasingly furnished by Congress, and because of the high social value placed upon the rights involved"); *Brown* v. *Ballas*, 331 F. Supp. 1033 (N.D. Tex. 1971) (fee awarded in housing discrimination case brought under the Fair Housing Act and Section 1982 since "much of the elimination of unlawful racial discrimination devolves upon private litigants and their attorneys"); *Ross* v. *Goshi*, 351 F. Supp. 949 (D. Hawaii 1972) (fee award in Section 1983 free speech case because "the only practicable means of enforcing section 1983 is by private parties," because "private parties are least able to bear the cost of vindicating constitutional rights"); *Thonen* v. *Jenkins*, 374 F. Supp. 134 (E.D.N.C. 1974) (fee awarded in Section 1983 free speech case to "encourage" vindication of constitutional rights); *Kirkland* v. *New York Dept. of Correct. Serv.*, 374 F. Supp. 1361 (S.D.N.Y. 1974) (fee awarded in employment discrimination case brought under various constitutional and statutory provisions, applying the factors set forth in *La Raza Unida*, *supra*); *Scott* v. *Opelika City Schools*, 63 F.R.D. 144 (M.D. Ala. 1974) (fee awarded in Section 1983 sex discrimination case which "effectuate[d] a strong Congressional policy"); *Palmer* v. *Columbia Gas Inc.*, 375 F. Supp. 634 (N.D.

was not intended to punish Alyeska as a law violator or as a wrongdoer. *Ibid.*

Alyeska argues that the Mineral Leasing Act and NEPA imposed no legal obligation upon it and that therefore no fees can be awarded against it as a matter of law. P. Br. 16-23. As a technical matter, Section 28 of the Mineral Leasing Act did impose an enforceable legal obligation on Alyeska to observe all of the provisions of the section under pain of forfeiture of any right-of-way that might be granted. See pp. 82-83 *infra*. Far more significantly, however, Alyeska's conclusion that a violation of a legal obligation is a prerequisite for a fee award is simply wrong. Courts of equity frequently award fees against persons who have not violated any legal obligation. In common benefit cases, for example, the

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Ohio 1974) (fee awarded in Section 1983 case challenging public utility termination procedures because case "substantially benefited" present and future customers and because the award "assures that the vindication of constitutional rights need not depend upon the financial resources of the particular individuals who seek to secure those rights"); *Calnetics Corp* v. *Volkswagen of America, Inc.*, 353 F. Supp. 1219 (C.D. Cal. 1973) (fee awarded in private antitrust suit seeking only injunctive relief since plaintiff vindicated "a policy of compelling national economic interest" and produced benefits "not only for itself but for all competitors", and because private actions are necessary to assure enforcement of the antitrust laws).

See generally cases collected in Derfner, *Attorneys' Fees in Pro Bono Publico Cases*, reprinted in *Hearings on The Effect of Legal Fees on The Adequacy of Representation Before the Subcomm. on Representation of Citizen Interests of the Senate Judiciary Comm.*, 93d Cong., 1st Sess., pts. 3 and 4, at 862 (1973).

fee award is paid by beneficiaries of the litigation—and sometimes even non-beneficiaries—who violated no legal obligations.[92] Thus, the court of appeals clearly had the power to require Alyeska to pay fees in this case if, under all the circumstances, the equities justify such an award. As demonstrated below, they clearly do.

The Trans-Alaska Pipeline was Alyeska's project. The litigation resulted from actions and decisions for which Alyeska was directly responsible (and, in the case of the Mineral Leasing Act, legally liable). Alyeska was a real party in interest and took a lead role in the litigation to protect those interests. Alyeska received direct benefits from the litigation and is in a position to shift the award to beneficiaries of other benefits identified in the court's decision. The

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[92] As Justice Harlan explained:

> "This Court in *Sprague* upheld the District Court's power to grant reimbursement for a plaintiff's litigation expenses even though she had sued only on her own behalf and not for a class, because her success would have a *stare decisis* effect entitling others to recover out of specific assets of the same defendant. *Although those others were not parties before the court, they could be forced to contribute to the costs of the suit by an order reimbursing the plaintiff from the defendant's assets out of which their later recovery would have to come.*" *Mills*, 396 U.S. at 393. (Emphasis supplied.)

In the *Sprague* litigation even some non-beneficiaries were required to pay fees. See p. 37 *supra*. *See also* the discussion of *Mills*, p. 81 n. 103 *infra*.

Alyeska's argument that it had "no control" over the governmental decision-making, P. Br. 21, is simply a corollary of its argument that it had no legal obligation and is not dispositive for the same reason.

award of fees works no hardship on Alyeska and will not deter others similarly situated. And, finally, the court's decision not to award fees against the other defendants worked no hardship or unfairness on Alyeska.

A. The Litigation Stemmed from Actions and Decisions for Which Alyeska Was Directly Responsible

As was consistently emphasized by Secretary Morton and other Interior Department officials throughout the proceedings below, the Trans-Alaska Pipeline is a private project.[93] The pipeline was conceived by and is intended to promote the economic interests of Alyeska's principals. It was Alyeska's principals that decided to take their product to market over lands

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[93] *See, e.g.*, Statement of then Under Secretary Train, *Hearings Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess., pt. 2, 124 (Oct. 16, 1969) ("the private sector, at least, has made a decision that this is an important resource that it expects to develop and this has been a traditional way in which such decisions have been made in this country"); Statement by Secretary Morton, *Hearings on S. 35, S. 835 and S. 1571 Before the Senate Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess., pt. 2, at 454, 456 (April 20, 1971) ("the scope of our work here is to deal with the applications on our desk") ("this is their money and this is their project"); Statement by Secretary Morton, *Oversight Hearings on the National Environmental Policy Act and Its Implementation Before the Senate Comms. on Public Work and Interior and Insular Affairs*, 92d Cong., 1st Sess. 404 (March 9, 1972) ("we have to remember this is not a Government project"); Statement of (then) Under Secretary Pecora, Press Conference, March 20, 1972, 9-10 (P. Docs. III, Tab B) (R. 207) ("The Department has before it at the present time only one application and this is an application from Prudhoe Bay to Valdez, and that is the application on which action will be taken.").

owned by the Federal Government. It was also Alyeska's principals that then decided to address their request for rights-of-way to the Secretary of the Interior rather than to Congress.

The decision to bypass Congress was made in the first instance by Alyeska's principals, *not* by the Secretary. When Alyeska addressed its application to the Secretary rather than to Congress, it did so with an awareness that the right-of-way allowed by statute was not adequate for the pipeline they proposed [94] and without reliance on any published regulation or other "expressly articulated position at the administrative level." *Wilderness Society I*, 479 F.2d at 868.[95] Alyeska was free at any time to change its decision and address its request to Congress, but it declined to do so even after receiving a clear signal from the preliminary injunction.

At the time *Wilderness Society I* was decided, all seven judges on the court below recognized Alyeska's clear responsibility for the decision to bypass Congress and for the litigation spawned by that decision:

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[94] *See* p. 8 *supra*.

[95] *See* p. 25 n. 39 *supra*. In this respect, the instant case is clearly distinguishable from *Committee To Stop Route 7 v. Volpe*, 4 ERC 1681 (D. Conn. 1972), cited at P. Br. 22, where the court expressly found:

> "The state agency simply relied upon a federal regulation . . . In these circumstances, it would not be appropriate to impose attorney's fees as a cost against the state, when the federal agency made the erroneous decision which led to the plaintiffs' judgment." *Id.* at 1682.

"Congress . . . *allowed pipeline companies* to use a certain amount of land to construct *their* pipelines. *These companies* have now come into *court*, . . . and have said, 'This is not enough land; give us more.' We have no . . . power to grant *their* request . . . . (Emphasis added). 479 F.2d at 891.

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"I recognize that *Alyeska* must now go to Congress for an amendment to a law that never contemplated that a pipeline of this magnitude would be required to be built under the harsh conditions of soil and climate that exist in Alaska. That is regrettable . . . , but it is Congress that has the legislative power not this court." (Emphasis added). (Separate opinion of MacKinnon, J.). 479 F.2d at 905.

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"Regrettably, the *would-be builders* of the Alaska Pipeline sought from the courts rather than the Congress clearly necessary changes in the statutory restriction on the use of public lands." (Emphasis added). (Separate opinion of Wilkey, J.). 479 F.2d at 912.

Similarly, insofar as compliance with NEPA's policies is concerned, Alyeska as the proponent of the project bore a responsibility to attend to its environmental consequences. Indeed, the regulations and guidelines adopted by the Department of Interior and other agencies to implement NEPA recognize that where NEPA is applied to private projects requiring federal authorization, the responsibility for the initial analysis of environmental consequences often rests

with the private application.[36] As has been discussed above, both at the time of its original application, and for a substantial period thereafter, Alyeska was unprepared for the undertaking it espoused. This unpreparedness was a direct causative factor of the litigation.

All of this is not to say that Alyeska should be "punished" for any of the actions described above. But it does refute the inaccurate impression Alyeska seeks to convey in its brief that it was somehow a mere bystander to the events that led to the initiation of this litigation in March 1970 and to the court's decision in *Wilderness Society I*. See P. Br. 16-23.[37]

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[36] *See, e.g.*, Interior Dept. Regs. part 516, ch. 2.9(F)(2); Atomic Energy Commission, 39 Fed. Reg. 26279, §§ 51.20, 51.21 (July 18, 1974); Law Enforcement Assistance Administration, 28 C.F.R. §§ 19.9(b)(2), (b)(5), (c); Department of Agriculture: Rural Electrification Administration, 39 Fed. Reg. 23240, § V(D)(2) (June 27, 1974); Department of Transportation, 39 Fed. Reg. 35234, § 7(e) (Sept. 30, 1974); Council of Environmental Quality, 40 C.F.R., ch. V, § 1500.7 (c). To recognize Alyeska's responsibility in this regard by no means derogates the non-delegable legal duty of the Secretary to make his own evaluation of environmental issues and to take responsibility for the scope and content of draft and final environmental statements. *See Greene County Planning Bd.* v. *FPC*, 455 F.2d 412, 420 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972).

[37] The court's conclusion that Alyeska's responsibility for the project in question and for the events that led to the litigation is a relevant consideration in determining where the equities lie as between Alyeska and respondents is grounded on solid equitable principles. *See, e.g., Pompton* v. *Cooper Union*, 101 U.S. 196, 204 (1879) ("Where one of two innocent persons must suffer a loss, and one of them contributed to produce it, the law throws the burden on him and not upon

B. Alyeska Was a Real Party in Interest and Took an Active Role in the Litigation

Alyeska did not merely contribute indirectly to the litigation by actions and decisions taken by its principals outside the courtroom. As the court of appeals noted, "after successfully persuading the Interior Department to grant the rights-of-way, Alyeska intervened in the litigation to protect its massive interests." *Wilderness Society II*, 495 F.2d at 1036.

Alyeska's intervention was premised on the recognition that as a private party it had "a greater interest than the Secretary of the Interior in advancing arguments in support of the Secretary's authority to issue the necessary rights-of-way and permits."[39] Once in the litigation, Alyeska played a vigorous and independent role in furthering and protecting those interests. Alyeska made extensive discovery demands on respondents and filed motions and memoranda on a broad variety of procedural matters. When respondents requested that the district court consider the Mineral Leasing Act issues as threshold questions,

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the other party"). *See also National Safe Deposit, Sav. & Trust Co.* v. *Hibbs*, 229 U.S. 391, 394 (1913); *Hill* v. *Flota Mercante Grancolombiana, S. A.*, 267 F. Supp. 380, 384 (E.D. La. 1967), *aff'd*, 405 F. 2d 878 (5th Cir.), *cert. denied*, 395 U.S. 934 (1969); *Winchell* v. *Moffat County State Bank*, 307 F.2d 280, 282 (10th Cir. 1962); *Henry* v. *Auchincloss, Parker & Redpath*, 305 F.2d 753, 754 (D.C. Cir. 1962); *James Talbott, Inc.* v. *Associates Discount Corp.*, 302 F. 2d 443, 446-47 (8th Cir. 1962) (Blackmun, J.); *Whitehead* v. *American Secur. & Trust Co.*, 285 F.2d 282, 284 (D.C. Cir. 1960); *Ryan* v. *Spaniol*, 193 F.2d 551, 553 (10th Cir. 1951).

[39] *See* p. 16 *supra*.

it was Alyeska, later joined by the other defendants (see, *e.g.*, Jt. App. 153), that insisted that all issues be heard together. Alyeska then filed hundreds of pages of printed briefs and took the major portion of the oral argument in both the district court and the court of appeals.

In considering Alyeska's "major and real" role in the litigation and the fact that Alyeska required respondents "to brief and argue an issue which, because of their very success on the Mineral Leasing Act issue, never became ripe for adjudication," [99] the court of appeals was in no sense punishing Alyeska for having intervened in the litigation or for having vigorously pursued its own interests. Rather, the court was simply recognizing that just as Alyeska was not a mere bystander in the events which led to this litigation, Alyeska was not a mere bystander in the litigation itself.

C. Alyeska Received Direct Benefits from the Litigation and Is in a Position to Shift the Award to Other Beneficiaries of the Litigation

The opinion of the Fifth Circuit in *Sierra Club* v. *Lynn*, 502 F.2d 43 (1974), cited extensively in petitioner's brief, highlights two additional factors that lend further support to the fairness of the decision to shift fees from respondents to Alyeska.

In *Sierra Club* v. *Lynn*, the Department of Housing and Urban Development approved federal funding for a new town to be constructed by a private developer astride "Edwards Aquifer, an underground water-bearing formation that is the sole water supply

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[99] *Wilderness Society II*, 495 F.2d at 1035.

for the City of San Antonio and 1,000,000 area residents." 502 F.2d at 48. Litigation was instituted by private citizens alleging, among other grounds, that the environmental impact statement prepared by HUD did not comply with NEPA's provisions in that it did not adequately consider the impact of the project on the City of San Antonio and the 1,000,000 area residents who were dependent on Edwards Aquifer for their water supply. The district court subsequently awarded fees to plaintiffs for their litigation efforts that were deemed by that court to have "advanced the public interest by ensuring that adequate precautions would be taken to protect the aquifer." *Id.* at 64.

In overruling that award the court of appeals emphasized that "none of the benefits of this litigation cited by the district court have inured, except in the abstract, to the developer." *Ibid.* In the instant case at least some of the benefits of the litigation—*i.e.*, those that protect the physical integrity of the pipeline—confer direct and concrete economic benefits on Alyeska and its principals.

Of greater relevance, however, is the conclusion of the Fifth Circuit that even if the developer in *Sierra Club* v. *Lynn* had received no concrete benefit from the litigation, an award of fees against it would have been proper if the developer were in a position to distribute the award among the beneficiaries of the action. As the court explained:

> "*The common benefit rationale could justify an award against a* public agency or *private entity which would be able to shift the costs in common to the members of the public who draw their*

> *water from the Edwards Aquifer.* Clearly, the developer is not in a position to distribute the costs of this litigation to the one million residents of the San Antonio area who will benefit from the preservation of this water source." (Emphasis added.) *Id.* at 65.

In marked contrast, Alyeska's principals are in an excellent position to distribute the fee award among the ultimate beneficiaries of this litigation—the oil-consuming public, whom the litigation benefitted by protecting the physical integrity of the pipeline, and the general public whom the litigation benefitted by protecting both the environment and "the proper functioning of our system of government." *Wilderness Society II*, 495 F.2d at 1033.[100] The seven beneficial owners of Alyeska do business collectively in 49 states plus the District of Columbia and account

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[100] When the court below asserted that "imposing attorneys' fees on Alyeska will not serve to spread the costs of litigation proportionately," *Wilderness Society II*, 495 F.2d at 1029, it did not have the benefit of the Fifth Circuit's analysis in *Sierra Club* v. *Lynn*.

The factual differences between *Sierra Club* v. *Lynn* and *Wilderness Society II* render the cases distinguishable. But insofar as *Sierra Club* v. *Lynn* can be construed as a holding that the presence of a direct legally enforceable obligation is an absolute prerequisite to an award of fees, it is both factually distinguishable from the instant case (*see* pp. 82-83 *infra*) and is inconsistent with long-established equitable principles. *See* pp. 71-72, 76 n. 97 *supra*. The Fifth Circuit's conclusion that it would be unfair to award fees "in the absence of proof that the private parties controlled the government agency's action or caused its default," 502 F.2d at 66, may be applicable to the facts of that case. However, it is clearly not correct as a general proposition, as the facts of the instant case demonstrate. *See also* p. 72 n. 92 *supra*.

for over twenty percent of the national market in gasoline sales.[101] Under the provisions of Pub. L. No. 93-153 those companies are already obligated to "reimburse the United States for administrative and other costs incurred in processing the application," Section 28(1)—including the cost of the various environmental undertakings by the Interior Department which, at last estimate, exceed nine million dollars.[102] Those costs will, of course, be distributed by the companies to their customers. The marginal increment represented by the fee award in this case can be similarly distributed. While Alyeska's principals can spread the fee among their customers only and not among all persons who have benefitted, this spreading mechanism is no more imperfect than other mechanisms approved by this Court and numerous lower courts in other contexts.[103]

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[101] 1974 *National Petroleum News Factbook* 109, 111-122.

[102] Supporting documents, Vol. 4, Tab 26, and Vol. 5, Tab 9 (R. 230).

[103] The imperfection of the fee-shifting mechanism in *Sprague*, where even non-beneficiaries were required to pay fees, is discussed at p. 37 *supra*. *Mills* is even closer to the present case. There the court suggested that there were two classes of beneficiaries, the stockholders of the corporation which sent out unlawful proxies and "all shareholders." This Court permitted fees to be awarded against a "successor corporation" whose shareholders were not coextensive with those in the corporation which sent out the unlawful proxies, and, of course, not coextensive with "all shareholders" throughout the country. In short, the court was willing to permit an award against some ultimate beneficiaries when other beneficiaries were not required to pay—precisely the situation in the present case.

Lower courts have also adopted imperfect machanisms for spreading costs. *See, e.g., Brewer v. Norfolk School Bd.*,

D. The Mineral Leasing Act Imposed a Direct Legal Obligation on Alyeska

Respondents contend that in light of the factors summarized above, fees can be awarded against Alyeska even if no legal obligation was imposed upon Alyeska by the Mineral Leasing Act and NEPA. But to the extent that the existence of such an obligation may be considered a factor in determining the fairness of an award of fees against a party, it too is present in this case. Section 28 of the Mineral Leasing Act explicitly provided that:

> "*Failure to comply with the provisions of this section* or the regulations and conditions pre-

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456 F.2d 933 (4th Cir.), *cert. denied*, 406 U.S. 933 (1972) (in a desegregation case which secured free busing for some students, the "only feasible solution in this particular situation" was to shift fees to the school board, and ultimately to all taxpayers contributing to the school board's funds, even though the only beneficiaries were those children receiving free school busing); *Callahan* v. *Wallace*, 466 F.2d 59 (5th Cir. 1972) (in a case forbidding justices of the peace from trying traffic cases in which they have a pecuniary interest, fees were shifted to the state, and ultimately to all taxpayers, even though the only beneficiaries were certain driving members of the public); *Newman* v. *Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972) (in a prisoner rights case, fees shifted to state, and ultimately to all taxpayers, even though the only beneficiaries were state prison inmates); *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972) (in a reapportionment case, fees shifted to state, and ultimately to all taxpayers, even though beneficiaries were only those voters previously underrepresented in the legislature); *NAACP* v. *Allen*, 340 F. Supp. 703 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974) (in an employment discrimination case, fees shifted to state, and ultimately to all taxpayers, even though the only direct beneficiaries were black applicants to the state police force).

scribed by the Secretary of the Interior *shall be ground for forfeiture of the grant by the United States District Court* for the District in which the property, or some part thereof, is located in an appropriate proceeding." (Emphasis added).

Thus, on the face of the statute, compliance with the provisions of the Mineral Leasing Act, including its width limitations, was not merely an obligation of the Secretary's. Such compliance could be enforced directly against Alyeska by an action taken to forfeit any grant that might be issued which did not "comply with the provisions of this section." [104]

E. The Award of Fees Works No Hardship on Alyeska

The court of appeals also properly considered whether an award against Alyeska would deter Alyeska or others similarly situated from pursuing their interests in court. *Wilderness Society II*, 495 F.2d at 1032, 1036. It was for this limited purpose only that the court examined the financial stake of Alyeska and its principals in the litigation.[105]

The Supreme Court employed a similar approach in *Hall* v. *Cole*. There petitioners contended that "the

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[104] *Compare Denver Petroleum Corp.* v. *Shell Oil Corp.*, 306 F. Supp. 289, 303 (D. Colo. 1969) which construed the common carrier provision of Section 28. ("No administrative office or agency is entitled to exempt crude oil pipelines from the provisions of Section 28 of the Mineral Leasing Act.").

[105] There is thus no basis for the suggestion that the real premise of the court's opinion is "oil companies are prosperous, [respondents] are poor, and therefore the oil companies should finance both sides of this litigation." *Wilderness Society II*, 495 F.2d at 1042 (MacKinnon, J., dissenting), quoted at P. Br. 9. And the court's conclusion that Alyeska would not be deterred by an award of fees was obviously correct.

payment of counsel fees out of the union treasury might deplete union funds to such an extent as to impair the union's ability to operate as an effective collective bargaining agent and to endanger union stability." 412 U.S. at 9 n.13. The Court agreed that "this consideration is undoubtedly an important one." The Court stated, however, that it is "relevant, not to the *power* of federal courts to award counsel fees generally, but, rather, to the exercise of the District Court's discretion on a case-by-case basis." *Ibid.* (Emphasis in original.) Then, the Supreme Court, like the court of appeals here, looked at the specific facts of the case and concluded that "petitioners do not, and indeed cannot, contend that the award of only $5,000 would in any sense jeopardize union stability." 412 U.S. at 15 n.23.

F. Alyeska Was Not Prejudiced by the Lack of an Award Against the Other Defendants

Respondents in the court of appeals sought to recover attorneys' fees only from Alyeska and not from the State of Alaska or the Federal Government. The court of appeals taxed only Alyeska, but limited its award against Alyeska to one half of the fees requested. The court's decision was clearly within its equitable discretion and did not prejudice Alyeska.

The court concluded that it was "inappropriate" to tax the State of Alaska. The court's distinction between the State of Alaska and Alyeska is eminently sound. Unlike Alyeska, the State of Alaska did not initiate the project at issue, did not play a major role in the litigation and, following the analysis of *Sierra Club* v. *Lynn*, could not shift the cost of the litiga-

tion to a substantial number of those who benefitted from the litigation.

The court of appeals found that 28 U.S.C. § 2412 barred a fee award against the Federal Government. Accordingly, it concluded:

> "In recognition of the Government's role in the case . . . Alyeska should have to bear only half of the total fees. The other half is properly allocated to the Government and, because of the statutory bar, must be assumed by appellants. In this manner the equitable principle that appellees bear their fair share of this litigation's full costs and the congressional policy that the United States not be taxable for fees can be accommodated." *Wilderness Society II*, 495 F.2d at 1036.

Alyeska argues that if fees are barred against the Government, *a fortiori* they are barred against Alyeska. P. Br. 23. But for the reasons advanced above there is nothing *a fortiori* about it. Moreover, Alyeska's argument overlooks the holdings of this Court that a congressional statute does not bar attorneys' fees unless it "meticulously detail[s] the remedies available to a plaintiff" [106] or otherwise evidences a "purpose to circumscribe the court's power to grant appropriate remedies." [107] The general language of Section 2412 is simply not specific enough to deny a court of equity the power to award fees to respondents in this case since the comprehensiveness of:

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[106] *Hall* v. *Cole*, 412 U.S. at 9-10, quoting *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. at 719.

[107] *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. at 391.

> "[E]quitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." [108]

Respondents do not challenge the court's decision to shift only half of the fees in issue to Alyeska. But respondents submit that in light of the factors described above, it would have been equitable for the court to have taxed the entire award against Alyeska. Indeed, it would have been equitable for the court to have shifted the entire award to Alyeska *even if it found no statutory bar against shifting a portion of respondents' fees to the Federal Government.* For, as noted above, there is a strong congressional policy—specifically reaffirmed in Pub. L. No. 93-153—in favor of requiring the applicant rather than the Government to pay the transaction costs involved in obtaining pipeline rights-of-way.

In short, by shifting to Alyeska only half the fees in issue, the court of appeals bent over backwards to assure that Alyeska was not prejudiced by the absence of any award against the Government. This exercise of the court's equitable discretion is further evidence of the court's judicious effort to fashion an equitable fee shifting mechanism that would not be unfair to Alyeska.

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[108] *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946).

IV. ALYESKA'S OTHER ARGUMENTS AGAINST THE AWARD OF FEES IN THIS CASE LACK MERIT.

Alyeska's Brief contains a number of other arguments against the award of attorneys' fees in this case. These arguments are refuted by the facts of this case and by judicial precedent.

A. Alyeska's Arguments About "Success" Do Not Apply To The Facts Of This Case And Do Not Provide A Useful Guide For Other Cases

Alyeska argues that fees should not be awarded to a party unless it "successfully litigates" the issue to a formal victory.[109] The inappropriateness of the rigid "success" requirement that Alyeska would impose on the equitable power to award fees is illustrated by the facts of this case. In every sense of the word, respondents were the successful party in *Wilderness Society I*. Through its decision on the Mineral Leasing Act issues, the court of appeals enjoined construction of the pipeline, thereby granting respondents all the relief that they sought and, indeed, all the relief that a court properly could have granted.

Respondents neither "won" nor "lost" on the NEPA issues, which never became ripe for adjudication because of respondents' "very success on the Mineral Leasing Act issues."[110] However, for at least three reasons it was appropriate for the court to award fees to respondents for their work on these non-

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[109] *See* P. Br. 33 *et seq.*

[110] *Wilderness Society II*, 495 F.2d at 1035. Alyeska's suggestion that it "prevailed" on the NEPA issues is inexplicable. P. Br. 33.

"winning" issues. *First*, the NEPA issues were briefed and argued because Alyeska insisted that they were necessary for an informed decision on the Mineral Leasing Act issues. See pp. 19-20 *supra*. *Second*, the exposition of the NEPA issues was found by the court of appeals to be helpful for an informed decision on the Mineral Leasing Act issues. *Wilderness Society II*, 495 F.2d at 1035. *Third*, respondents' litigation effectuated the policies of NEPA by forcing both government and industry to pay careful attention to the pipeline's environmental and technological hazards and thereby to reduce the project's risks. See pp. 45-50 *supra*.

More generally, Alyeska's formalistic "success" rule would impose on the equitable power of federal courts an artificial standard that ignores the realities of litigation.[11] As the Court recognized in *Sprague*,

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[11] As the court of appeals for the District of Columbia Circuit has asserted in another context:

> "As all lawyers know, a lawsuit does not always have to go to final adjudication on the merits in order to be effective. Assuming the effectiveness in terms of practical results, the litigation stage attained is relevant only to the amount of the fees to be allowed, and not to the issue of whether they should be awarded at all." *Yablonski* v. *United Mine Workers of America*, 466 F.2d 424, 431 (1972), *cert. denied*, 412 U.S. 918 (1973).

See also Fairley v. *Patterson*, 493 F.2d 598, 604 (5th Cir. 1974) (to require formal victory "would be to ignore the reality of this litigation"); *cf. Mills* v. *Electric Auto-Lite Co.*, 396 U.S. at 396 (the advancement of important legislative policy justifying a fee award can be accomplished even where a party does not obtain the ultimate relief sought by the filing and prosecution of the suit).

In the analogous area of costs, the "prevailing party" normally recovers costs on all litigated issues as a matter of

"the formalities of . . . litigation . . . hardly touch the power of equity in doing justice." 307 U.S. at 167. In civil rights cases, in particular, lower courts have recognized that non-"winning" plaintiffs can make significant contributions to the enforcement of the law.[112] These courts have, accordingly, awarded fees in a variety of cases that would violate the Alyeska success formula.[113]

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course. *See, e.g.*, U.S. Sup. Ct. R. 57 (1970); 28 U.S.C. § 2412; Fed. R. Civ. P. 54(d); *Esso Standard (Libya), Inc.* v. *S.S. Wisconsin*, 54 F.R.D. 26, 27 (S.D. Tex. 1971). There is no requirement that the party prevail on each and every issue. *See, e.g., Mashak* v. *Hacken*, 303 F.2d 526, 527 (7th Cir. 1962); *Howerton* v. *Mississippi County*, 361 F. Supp. 356, 360 n.2 (E.D. Ark. 1973); *Oster* v. *Rubinstein*, 142 F. Supp. 620, 621 (S.D.N.Y. 1956); 6 *Moore's Federal Practice* ¶ 54.70 [4] at 1306 (1972). Indeed, costs are awarded to "prevailing parties" even for issues on which they lose. *See, e.g., Hines* v. *Perez*, 242 F.2d 459, 466 (9th Cir. 1957); *Best Medium Pub. Co.* v. *Nat's Insider, Inc.*, 385 F.2d 384, 386 (7th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968); *Lewis* v. *Pennington*, 400 F.2d 806, 820 (6th Cir.), *cert. denied*, 393 U.S. 983 (1968). And there is clear precedent in the cost area for awarding costs against the party responsible for the litigation of issues that need not be adjudicated for a resolution of the case. *See, e.g., Textile Workers Union* v. *American Thread Co.*, 271 F.2d 277, 278 (4th Cir. 1959); *Switzer Bros., Inc.* v. *Chicago Cardboard Co.*, 252 F.2d 407, 412 (7th Cir. 1958); *Esso Standard (Libya), Inc.* v. *S.S. Wisconsin, supra*, 54 F.R.D. at 27; *Davy* v. *Faucher*, 84 F. Supp. 737, 738 (N.D. Fla. 1949).

[112] Indeed, courts encourage parties to take steps which eliminate the need for formal adjudication.

[113] Many of these cases are collected in the Amicus Curiae brief that the Lawyers' Committee for Civil Rights Under Law has filed in this case. As demonstrated by the cases collected in the Lawyers' Committee brief, lower courts have awarded fees in civil rights cases where plaintiffs have won

A similar need for flexibility exists in environmental cases. Indeed, in recognition of the fact that environmental litigation often produces benefits without a formal court victory, Congress has specifically provided that a plaintiff may be awarded attorneys' fees under the Clean Air and the Federal Water Pollution Control Act Amendments *supra*, without achieving any formal "win." As stated in the Senate reports accompanying the pertinent Amendments to both of these Acts, fee awards to non-"winning" plaintiffs may be appropriate:

> ". . . in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions." [114]

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only some of the relief they sought, *e.g., Clark* v. *Board of Educ. of Little Rock School Dist.*, 449 F.2d 493 (8th Cir. 1971) (*en banc*), *cert. denied*, 405 U.S. 936 (1972); *Thomas* v. *Honeybrook Mines, Inc.*, 428 F.2d 981 (3d Cir. 1970), *cert. denied*, 401 U.S. 911 (1971); where defendants have changed the challenged practice without a formal adjudication of the claim or the suit has otherwise served as a catalyst for change, *e.g., Parham* v. *Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970); *Hammond* v. *Housing Authority Urban Renewal Agency*, 328 F. Supp. 586 (D. Ore. 1971); and where the case has been settled, in one way or another, without an adjudication of liability, *e.g., Blumenthal* v. *Lee Memorial Hospital*, No. H-70-C-5 (E.D. Ark., August 6, 1971); *Webb* v. *Baxley*, No. 3564-N (M.D. Ala., Jan. 18, 1973).

[114] S. Rep. No. 91-1196, 91st Cong., 2d Sess. 38 (1970) (Clean Air Amendments of 1970); S. Rep. No. 92-414, 92d Cong., 1st Sess. 81 (1971) (Federal Water Pollution Control Act Amendments of 1972).

Thus, the appropriate standard should be the one followed by the court below and recently adopted by the First Circuit, which rejected the rule Alyeska now proposes for the following reasons:

> "We are at liberty to consider not merely 'who won', but what benefits were conferred. The purpose of an award of costs is not mainly punitive. It is to allocate the costs of litigation equitably, to encourage the achievement of statutory goals." [115]

Alyeska does not cite a single authority for the contrary position that it now asks this Court to adopt.

B. Alyeska's Objections to Fee Awards for Salaried Attorneys Lack Merit

Alyeska argues that no fees should be awarded in this case because respondents exist to preserve environmental values and their attorneys were salaried employees of organizations formed to provide groups such as respondents with litigation assistance. P. Br. 43-45. But Congress, this Court, and the lower courts have frequently authorized fee awards to lawyers who are salaried employees of such organizations, and Alyeska offers no persuasive reasons for departing from this settled practice now.

At the time Congress enacted the attorneys' fees provisions of the Civil Rights Act of 1964, § 204(b),

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[115] *Natural Resources Defense Council* v. *EPA*, 484 F.2d 1331, 1338 (1st Cir. 1973). *Accord, e.g., McEnteggart* v. *Cataldo*, 451 F.2d 1109 (1st Cir. 1971), *cert. denied*, 408 U.S. 943 (1972); *Blau* v. *Rayette-Faberge, Inc.*, 389 F.2d 469 (2d Cir. 1968); *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973).

42 U.S.C. § 2000a-3(b), and subsequent civil rights legislation, many of the leading civil rights cases were being brought by the salaried attorneys of such organizations as the NAACP Legal Defense and Educational Fund.[116] Similarly, at the time Congress passed the attorneys' fees provision of the Clean Air and Federal Water Pollution Control Act Amendments, *supra*, many of the leading environmental cases were being brought by organizations such as respondents.[117] There is not a single indication that Congress wished to bar fee awards to salaried attorneys of such civil rights and environmental organizations or to treat them differently from other attorneys.

Nor has this Court ever suggested that salaried attorneys of non-profit organizations are ineligible for fee awards. Indeed, the case in which this Court firmly established the right of attorneys to obtain fees under the 1964 Civil Rights Act, *Newman* v. *Piggie Park Enterprises, Inc.*, *supra*, was brought by salaried attorneys of the NAACP Legal Defense

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[116] Prior to 1964, virtually every major civil rights case was litigated principally by salaried attorneys of a national organization. *See, e.g., Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960).

[117] Among the well-known environmental cases undertaken prior to Congress' enactment of the attorneys' fee provision of the Clean Air Act on December 31, 1970, were *Environmental Defense Fund* v. *Hardin*, 428 F.2d 1093 (D.C. Cir. 1970); *D.C. Fed'n of Civic Ass'ns, Inc.* v. *Volpe*, 434 F.2d 536 (D.C. Cir. 1970); *Scenic Hudson Preserv. Conf.* v. *PFC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

and Educational Fund. This Court has also upheld fee awards to Fund attorneys in *Northcross* v. *Memphis Board of Education* and *Bradley* v. *Richmond School Board, supra.*

Once it is determined that a fee award is proper under the court's equity power, there is no basis for distinguishing between statutory and non-statutory cases in awarding fees to salaried attorneys of non-profit organizations. And, in fact, lower federal courts have awarded fees to salaried attorneys of such organizations in a wide range of civil rights and poverty law cases where fees were not authorized by statute.[118]

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[118] *See, e.g., Fairley* v. *Patterson*, 493 F.2d 598 (5th Cir. 1974); *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971). In *Brandenburger* v. *Thompson*, 494 F.2d 885, 889 (1974), the Ninth Circuit recently asserted:

> "It is true that the prospect of attorneys' fees does not discourage the litigant from bringing a suit when legal representation is provided without charge. But the entity providing the free legal services will be so discouraged, and an award of attorneys' fees encourages it to bring public-minded suits when so requested by litigants who are unable to pay. Thus, an award of attorneys' fees to the organizations providing free legal services indirectly serves the same purpose as an award directly to a fee paying litigant."

In *Hoitt* v. *Vitek*, 495 F.2d 219, 221 (1974), the First Circuit explained:

> "None of the legitimate reasons for the exercise of the court's equitable discretion turns on the nature of an individual attorney's normal means of reimbursement. These grounds for fee awards look to the past behavior of the parties and toward encouraging legal representatives in similar situations in the future. If the sole rep-

The reason that Congress and the courts have failed to seize upon the distinction suggested by Alyeska is obvious. A basic premise of fee awards, as *Newman* and *Hall* recognize, is that, despite the long tradition of the bar in providing legal services to the needy, litigation effectuating public policies cannot depend upon the charity of the private bar. Certainly, then, such litigation cannot depend upon the charity of lay donors who pay the salaries of the attorneys for non-profit organizations.[119]

The budgets of respondents and the Center for Law and Social Policy are similar to those of the

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resentatives of the plaintiffs below had been [New Hampshire Legal Assistance] and the district judge had reasoned, as he did, that the suit merited award under the "private attorney general" theory, we would find it difficult to discern the advancement of any legitimate policy by the denial of fees to NHLA."

[119] Nor should individuals and citizen groups with legitimate need for access to the courts be totally subject to the vageries of foundation policies and portfolios. The Ford Foundation, for example, has announced that it will reduce its grants by over 50% over the next four years as a result of the stock market decline. N. Y. Times, Dec. 15, 1974, p. 1, col. 5.

In *La Raza Unida* v. *Volpe*, 57 F.R.D. at 98 n.6, the court concluded:

"The fact that attorneys in this action, Public Advocates, Inc., require no fees from their clients or that they receive tax-exempt foundation money is not germane to their status as private attorneys general. *See Miller* v. *Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir. 1970). We cannot presume Congress intended to rely on tax-exempt foundations to fund costs of litigation in order to effectuate its policies, nor that such funding will continue in the future."

leading civil rights organizations.[120] Their primary sources of funding—charitable contributions from foundations or private individuals—are similar and in many instances identical to those of civil rights organizations.[121] Their attorneys should be as eligible to obtain fee awards as the attorneys in *Newman*, *Bradley*, and *Lee* v. *Southern Home Sites*, *supra*.[122]

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[120] The annual operating budget of the NAACP Legal Defense and Educational Fund is $4.4 million. *Legal Defense Fund: A Report to the American People* 15 (1974). The annual operating budget of the Lawyers' Committee for Civil Rights Under Law is $1.9 million. *Ten-Year Report: Lawyers' Committee for Civil Rights Under Law* 116 (1973). The annual operating budget of The Wilderness Society, the largest of the respondent organizations, is $1.6 million. *The Wilderness Society: The Directors' Annual Report* 6 (1974). The annual operating budget of the Center for Law and Social Policy, which provided most of the legal manpower for this litigation, is $600,000.

[121] The Ford Foundation, for example, is the primary funder of the Center for Law and Social Policy and a major funder of respondent Environmental Defense Fund, the NAACP Legal Defense and Educational Fund and the Lawyers' Committee for Civil Rights Under Law. See *Ford Foundation: Annual Report* 10, 20-21, 36, 38-39, 69 (1973). The Rockefeller Brothers Fund is an important funder of the Center for Law and Social Policy, the NAACP Legal Defense and Educational Fund and the Lawyers' Committee for Civil Rights Under Law. See *Rockefeller Brothers Fund: Annual Report* 27, 46, 51 (1973).

[122] Alyeska did not raise below, and does not press here, the argument of the dissenting judges below that respondents' attorneys should receive no fee award because, in connection with a Motion to Change Venue (R. 67, 70, 75), they stated that they were representing respondents without fee. See P. Br. 44 n. 36; *Wilderness Society II*, 495 F.2d at 1044-46 (dissenting opinion). This point is adequately covered in *Wilderness Society II*, 495 F.2d at 1037 n.9.

C. In Making Its Award Of Fees In This Case The Court Of Appeals Relied On Judicially Manageable Factors

Alyeska suggests that the factors relied on by the court of appeals in this case cannot be properly evaluated by courts. This suggestion is, of course, refuted by the facts of this case, where the statutory interests involved were clearly important, where the benefits of the litigation are readily assessed, and where the burdens of a uniquely massive lawsuit are readily apparent. It is refuted as well by the actual experience of courts which have traditionally applied similar factors.

Courts frequently determine whether statutory interests are sufficiently important to justify the invocation of equitable remedies. Courts make this determination in common benefit attorneys' fees cases,[123] in cases implying a private right of action, and in cases implying a right to compensatory damages where the statute failed to provide any. *See* pp. 61-62 *supra*.[124] They are capable of making a

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[123] *See, e.g., Mills* v. *Electric Auto-Lite Co.*, 396 U.S. at 396 ("the stress placed by Congress on the importance of fair and informed corporate sufferage"); *Hall* v. *Cole*, 412 U.S. at 8 ("the rights enumerated in Title I were deemed 'vital' ").

[124] Courts routinely assess the importance of statutory policies in a variety of other contexts involving the availability of equitable relief. *See, e.g., Boys Markets, Inc.* v. *Retail Clerks, Local 770*, 398 U.S. 235, 252 (1970), discussing *Brotherhood of R.R. Trainmen* v. *Chicago River & Ind. R.R.*, 353 U.S. 30 (1957) (equitable relief available because "an important federal policy was involved in the peaceful settlement of disputes through the statutorily mandated arbitration procedure"); *Gateway Coal Co.* v. *United Mine Work-*

similar determination in cases such as the present one.

Alyeska's speculation that the courts cannot evaluate the benefits conferred in a case where plaintiff does not technically "win" is refuted by the actual working experience of the lower courts. *See* pp. 88-90 *supra*. In addition, in common benefit cases this Court has experienced no difficulty determining that "others" benefited without determining that "others" have a legally winnable claim. *E.g.*, *Hall* v. *Cole*, *supra*. Finally, Congress has recognized the courts' competence in this area by expressly providing that attorneys' fees can be awarded to non-prevailing parties. *See* Clean Air and Federal Water Pollution Control Act Amendments, *supra*.

Courts are also uniquely well-equipped to evaluate economic obstacles and the need for fee shifting on a case-by-case basis. The extent of the economic obstacles depends on the cost of the litigation and the possibility of economic benefit to the plaintiffs. The greater the cost of the litigation, the less likely it will be undertaken by plaintiffs who have no hope of economic benefit. Courts see first-hand the complexity, and hence costliness, of the specific case. And courts, through their knowledge of the nature

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ers, 414 U.S. 368, 382 (1974) (equitable relief available because of "strong federal policy favoring arbitration of labor disputes"); *Bradley* v. *Richmond School Bd.*, 416 U.S. at 717 (1974) (application of existing law depends on nature of the parties and nature of the right), following *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) ("in great national concerns . . . the court must decide according to existing law").

of the plaintiffs and the relief sought, can readily evaluate the possibility of economic benefit to the plaintiffs.

D. A Fee Award In This Case Will Not Lead To Frivolous Litigation

There is no basis for Alyeska's suggestion that the fee award in this case will encourage frivolous litigation. P. Br. 34. The fee award here rests upon the equities of a particular case—certainly one of the most important and complex environmental cases ever undertaken. The factors which supported a fee award here can provide frivolous litigants absolutely no encouragement whatsoever. For such litigants, the expense of litigation will remain a substantial if not overriding obstacle—as it should. See *Office of Communications of United Church of Christ* v. *FCC*, 359 F.2d 994, 1006 (D.C. Cir. 1966).

After this case, as before, equitable fee awards will be available only in exceptional lawsuits where overriding considerations make a fee award appropriate. As Justice Blackmun said in another context: "We need not fear that Pandora's box will be opened or that there will be no limit to the number of those who desire to participate in environmental litigation. The courts will exercise appropriate restraints just as they have exercised them in the past." *Sierra Club* v. *Morton*, *supra*, 405 U.S. at 758 (1972) (dissenting opinion). These words echo those of Mr. Justice Bradley almost a hundred years ago in the first Supreme Court case to consider the appropriateness of fee awards in "common fund" cases. Answering the argument that such awards would prove to be "excessive" in practice, Justice Bradley said:

> "[A] just respect for the eminent judges under whose direction many of these cases have been administered would lead to the conclusion that allowances of this kind, if made with moderation and a jealous regard to the rights of those who are interested . . . are not only admissible, but agreeable to the principles of equity and justice." *Trustees* v. *Greenough*, *supra*, 105 U.S. at 536-37.

A similar confidence in the federal judiciary is justified today.

E. The Fee Award Need Not Be Limited To The Salaries Earned By The Attorneys Involved

Alyeska also argues that any fees awarded in this case should be limited to the salaries earned by the attorneys involved. The court of appeals, on the other hand, stated that the "fee should represent the reasonable value of the services rendered, taking into account all the surrounding circumstances . . . ." *Wilderness Society II*, 495 F.2d at 1036. The court suggested several criteria which, in its view, should guide a determination of the size of the award.[125] The flexible position adopted by the court of appeals is undoubtedly sound.

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[125] The criteria set forth by the court were as follows:

> "The fee should represent the reasonable value of the services rendered, taking into account all the surrounding circumstances, including, but not limited to, the time and labor required on the case, the benefit to the public, the skill demanded by the novelty or complexity of the issues, and the incentive factor." *Id.* at 1036.

In this regard, the criteria listed in the court's opinion reflect the American Bar Association's *Code of Professional Responsibility D.R. 2-106.*

Alyeska seems to contend that an "unsalaried" attorney is entitled to a reasonable attorney's fee, taking into account all the circumstances of the case, while a salaried attorney presumptively is not. P. Br. 43. But as the court of appeals noted, "it may well be that counsel serve organizations like [respondents] for compensation below that obtainable in the market. . . . Litigation of this sort should not have to rely on the charity of counsel any more than it should rely on the charity of parties. . . ." *Wilderness Society II*, 495 F.2d at 1037. It is quite possible that the salaried attorney of an environmental or civil rights organization is making a greater financial sacrifice than the lawyer in private practice who takes on a single *pro bono* case.

Under Alyeska's reasoning the poorer the organization and the lower the salaries it can pay its attorneys, the smaller the attorneys' fees award, regardless of the extent and novelty of the litigation effort or the benefits conferred. Quite simply, that is unfair. There is no reason an award should be lower because an attorney is willing to work for a below-market salary.

Alyeska argues that "payment of a bonus to respondents' counsel on the theory that they have 'vindicated' a public policy in this case merely subsidizes other litigation which may or may not vindicate such a policy." P. Br. 45. But courts never control how an attorney spends his fee award. The attorney may use it to support his practice, or for personal or charitable purposes. The only difference in the instant case is that the court has awarded fees to attorneys who, like the salaried attorneys of the NAACP

Legal Defense and Educational Fund, are committed to contributing the fees they receive to their organizations. These organizations will use the funds in a manner consistent with their non-profit charitable status and public interest objectives.

Finally, it is obvious that the mere reimbursement of salaries would not compensate the organizations which employ the attorneys for such related expenses as secretarial assistance and overhead. These related expenses are traditionally included in an attorney's fee and should be included here.

In sum, the court of appeals' flexible approach, which has been adopted in numerous other cases,[126] was correct and should not be disturbed by this Court.

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[126] *See, e.g., Fairley* v. *Patterson, supra,* 493 F.2d at 606:

> "The [district] court's verbalized reason for denying expenses and limiting attorneys' fees for the 'much greater service' performed by the original plaintiffs than the intervenor, is the fact that the funds would flow into 'the coffers of the Ford Foundation.' This is an impermissible rationale to use in determining the amount of attorneys' fees and expenses. This Court has indicated on several occasions that allowable fees and expenses may not be reduced because appellants' attorney was employed or funded by a civil rights organization and/or tax-exempt foundation or because the attorney does not exact a fee." (Footnotes omitted).

See also Clark v. *American Marine Corp.*, 320 F. Supp. 709 (E.D. La. 1970), *aff'd*, 437 F.2d 959 (5th Cir. 1971); *Miller* v. *Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir. 1970).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals authorizing an award of attorneys' fees to respondents should be affirmed by this Court.

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APPENDICES

APPENDIX A

DESCRIPTION OF THE TRANS-ALASKA PIPELINE SYSTEM *

A. The Proposed Project

The proposed Trans-Alaska pipeline would be the "most complex," "most costly," and "most ecologically sensitive" project ever undertaken (P. Docs. III, Tab B, p. 4). Its purpose is to transport oil from Prudhoe Bay on Alaska's North Slope to the Port of Valdez at Prince William Sound in southern Alaska. In order to construct the pipeline it will be necessary to build a road from Livengood to the North Slope to transport construction materials and personnel. Various other facilities, including air fields, pumping stations, and communication sites will also be required for construction and operation of the pipeline. From Valdez, the oil will be loaded onto tankers for marine transport to destinations on the west coast of the United States and possibly elsewhere (FIS, Vol 1, pp. 1-2).

The North Slope oil fields also contain significant quantities of natural gas (FIS, Vol. 4, p. 69). Much of the gas will be produced simultaneously with the oil and, indeed, must be produced if the oil is to be produced (FIS, Vol. 1, p. 57). "It seems clear that a single gas line will be built through Canada to the United States markets" (ESA, Vol. I, p. C-22). Such a gas transportation system is an essential requirement of any oil pipeline system (FIS, Vol. 1, p. 50, 57).

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* This description is taken verbatim from the Brief on National Environmental Policy Act Issues filed below by The Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth.

1. Terrestrial Impact of the Proposed Oil Pipeline

The Trans-Alaska oil pipeline would cut a swath across the entire length of Alaska. On its 789-mile journey, the proposed pipeline would cross some 641 miles of federal lands (FIS, Vol. 1, p. 1); transect the four major physiographic divisions of Alaska—the Interior Plains (the Arctic Slope), Rocky Mountain System (the Brooks Range), Intermontane Plateaus, and Pacific Mountain System (Alaska and Chugach Ranges) (FIS, Vol. 2, p. 13—and four primary river basins—those of the Sagavanirktok, Yukon, Copper, and Lowe Rivers—whose unpolluted waters constitute a vast wilderness primarily used for hunting, fishing, trapping, and recreation (FIS, Vol. 2, p. 76).

a. Wilderness and Recreation Areas

"Outside the cities of Anchorage and Fairbanks, the coastal towns and their interconnecting transportation routes are great expanses of wilderness" (FIS, Vol. 2, pp. 213-214). The pipeline would "divide" "into two" the "largest wilderness area in the United States," which extends from the Arctic Ocean to the Yukon River (FIS, Vol. 1, p. 151). The bleak Arctic Slope and the Brooks Range support a kingdom of wildlife including caribou, mountain sheep, moose, muskoxen, grizzly and polar bears, wolf, coyote, wolverine, fox, lynx, marten, mink, otter, weasel, and various rodents (FIS, Vol. 2, p. 175). And the wilderness south of the Brooks Range includes many of the same species in even greater densities (FIS, Vol. 2, pp. 184-186).

The associated 361-mile road from Livengood to the North Slope will open this heretofore unblemished wilderness, resulting in increased hunting pressures that will threaten the populations of grizzly and brown bear, polar bear, and mountain sheep (FIS, Vol. 4, pp. 164-165);

increased forest fires that will destroy forage for caribou and mountain sheep (FIS, Vol. 4, p. 109); and rapid deterioration of the "spectacular fishing quality" of northern streams (FIS, Vol. 4, p. 138). The route of this road "was chosen mainly to meet engineering requirements and to facilitate construction and servicing of the pipeline. . . . [P]ublic interest . . . was not a consideration in planning the layout of the road. . . . Large mammal resource values would be better protected . . . if . . . animal movements, hunter access and wildlife viewing had been taken into consideration. . . ." (FIS, Vol. 4, p. 39).

The pipeline would cross the Yukon River, which dwarfs all others in Alaska with a drainage area of 330,000 square miles, one-third of which is in Canada (FIS, Vol. 2, p. 155). The chinook, chum, and coho salmon in the Yukon which migrate as far as 2,000 miles to the headwaters to spawn represent unique and irreplaceable races of their species. Other fish found in the Yukon River basin include grayling, sculpin, sucker, whitefish, trout, northern pike, burbot, and inconnu (FIS, Vol. 2, pp. 155-156).

South of the Yukon River the pipeline will intrude on some of the most popular recreational areas in Alaska, including the Copper River System, the most important salmon water in central Alaska. About 40 million sockeye salmon have been taken commercially from the Copper River since 1904 and it supports an important subsistence fishery (FIS, Vol. 2, p. 156). The Gulkana River, the tributary of the Copper, which is tightly hugged by the pipeline route, is singled out as:

> ". . . a beautiful clean stream which is accessible by road almost throughout its entire length, [and as being] the most important fishery stream in the Copper River System. Some 100,000 sockeye and

20,000 chinook salmon and some steelhead migrate up this stream annually." (FIS, Vol. 2, p. 157).

The Gulkana flows through Summit and Paxson Lakes, both of which "offer excellent fishing. . . . Paxson Lake Campground . . . is the most heavily used recreation facility in this region. . . . [T]he campground is often over-subscribed during the summer" (FIS, Vol. 2, p. 254).

Some 234 gravel pits will be established from which will be extracted 83 million cubic yards of gravel (FIS, Vol. 1, p. 245; Vol. 4, p. 66). Access roads and the pipeline would also become permanent features of the landscape (FIS, Vol. 4, p. 139). Aesthetic values in all areas traversed by the pipeline would be reduced (FIS, Vol. 4, p. 139); and further development will follow on the heels of pipeline construction (FIS, Vol. 1, pp. 248-251).

b. Wildlife

Substantial sections of the pipeline will be elevated. These portions, together with the associated road, will present a "combined barrier effect" on migrations of large mammals, especially caribou, preventing them from reaching calving grounds and grazing ranges (FIS, Vol. 4, pp. 157-161).* However, "because of the limited re-

* The pipeline will transect carbou range in the Sagavanirktok, the Yukon, and the Copper River drainages (FIS, Vol. 2, p. 159, Table 12). The Sagavanirktok drainage is split down the middle by the pipeline and associated road. It is flanked by the ranges of the Porcupine herd, numbering 140,000 caribou, on the east and, on the west, by the Arctic herd which numbers 243,000 caribou. These two herds intermingle in the summer in the vicinity of the proposed pipeline route (FIS, Vol. 2, p. 176). For over 50 miles the pipeline could block their migration routes, including one pass used in spring by some 25,000 caribou (FIS, Vol. 4, pp. 158-159). In addition, certain damage to caribou will occur in the Copper River Basin where 20,000 caribou of the Nelchina herd may be cut off from their calving grounds (FIS, Vol. 4, p. 158). And, south of the Brooks Range portions of the Western Artic caribou herd as well as moose will be affected (FIS, Vol. 4, p. 157).

search that has been done to date on the behavior of wild animals, the significance of the disruption of behavior patterns on the well-being of wildlife cannot be fully evaluated" (FIS, Vol. 4, p. 149). Nor can a full evaluation be made of "the effects of the above-ground portions of the pipeline on movements of large mammals" (FIS, Vol. 4, pp. 531-533), the effects on large mammals of the odors and sounds from the pipeline (FIS, Vol. 4, p. 159), or the extent of destruction of lichens, which are forage for caribou, from SO2 emissions from pumping stations (FIS, Vol. 4, pp. 117-118). "Virtually no information is available . . . on the effects of crude oil on large mammals as a result of direct contact or ingestion" (FIS, Vol. 4, p. 626).

The "relative toxicity of North Slope crude oil to birds is not known" (FIS, Vol. 4, p. 229). But it is known that "refined petroleum materials are . . . lethally toxic to waterbirds" (Ibid), and that "oil spills on water and land are detrimental to birds and their habitat" (FIS, Vol. 4, p. 191). "Migratory birds that seasonally reside or migrate through [Alaska] . . . are part of an international resource that is shared by many people of many nations" (FIS, Vol. 2, p. 163). The Copper River Delta, which would be traversed by the pipeline "undoubtedly supports some of the greatest remaining concentrations of birdlife on the face of the earth" (FIS, Vol. 3, p. 311). Yet "except for a few species and races, information on seasonal distribution and numbers, breeding biology, habitat requirements and migration routes for most species within the State and adjacent marine waters is scanty at best and usually either fragmentary or generalized" (FIS, Vol. 2, p. 163).**

** Among the hundreds of bird species that will be jeopardized by oil spills along the tanker route are: whistling and trumpeter swans; mallards, black brant, yellow-billed loons, and the great crested grebe; the great blue heron, emperor goose, king eider,

c. Seismic Concerns

For a full two-thirds of its route, the pipeline traverses "one of the most seismically active regions in the world" (FIS, Vol. 3, p. 20). And "it is almost a certainty that one or more large earthquakes will occur in the vicinity of this portion of the proposed route during the lifetime of the pipeline" (FIS, Vol. 1, p. 97). Surface faulting is acknowledged to constitute a major risk of pipe rupture (FIS, Vol. 1, p. 15; Vol. 2, p. 11), and can in turn "trigger landslides and sea waves that could jeopardize the integrity of the pipeline" (FIS, Vol. 2, p. 11). Yet only one active fault has actually been identified along the entire pipeline route (FIS, Vol. 4, pp. 48-49). For four large segments, which total more than 250 miles, and are characterized by the occurrence of sizeable earthquakes, faults have either not been identified or have not been verified as being active (FIS, Vol. 4, pp. 40, 41, 44, 52).

d. Streams and Fish

The pipeline makes hundreds of stream crossings and parallels streams for half its route. Bed scour and bank erosion at stream crossings can rupture the pipeline (FIS, Vol. 1, Summary Sheet). Yet the features of the arctic and sub-arctic environment which determine the extent of bed scour and bank erosion (such as stream icings, ice jam floods, and floods resulting from outbursts of glacier-dammed lakes) vary greatly from year to year and have not been systematically studied (FIS, Vol. 2, pp. 81-83, 97). "[T]he amount of erosion to be expected due to construction activities cannot be predicted with any degree of precision because (1) the project descrip-

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ruddy duck, motley-faced shearwater, and least sandpiper; 14 species of gull, the endangered short-tailed albatross, long-tailed jaeger, marbled godwit, tufted puffin, whimbrel and the wandering tatler (FIS, Vol. 3, p. 309, Table 40).

tion doesn't give important 'as-built' details, (2) the probability and extent of future floods, icings, and ice jams are unknown, (3) the erosion effects of floods are difficult to evaluate, and (4) the success of erosion-control methods is unpredictable. . . ." (FIS, Vol. 4, p. 78).

Even with the best leak detection capability now developed, as much as 750 barrels of oil could be lost every day without being detected (FIS, Vol. 4, p. 135). If the pipe were actually to rupture, more than 60,000 barrels could escape (FIS, Vol. 1, p. 23). Any major spill resulting from pipeline failure would likely find its way into a stream (FIS, Vol. 4, pp. 16-53). From the point at which it is spilled, oil would drift downstream for considerable distances, jeopardizing not only the primary river basins but also the Beaufort Sea, Prince William Sound and the Pacific Ocean (FIS, Vol. 4, pp. 135-136). "Adequate studies on pollution and its effect on the reproductive capability of fish and invertebrates appear not to have been done" (FIS, Vol. 4, p. 199). "Detailed information is not available on the economic structure of Alaska's fisheries industry" (FIS, Vol. 4, p. 432). "[T]he cost effect of possible pollution impact on commercial fisheries is also not subject to determination, pending further studies" (FIS, Vol. 4, p. 363).

2. Marine Impact of the Proposed Oil Pipeline

The proposed oil pipeline will introduce the first major oil pollution into the waters of Prince William Sound and the Northeast Pacific (FIS, Vol. 4, p. 482).

At the present time, Prince William Sound is an area of "truly clean and untarnished beauty . . . teeming with marine life" (FIS, Vol. 2, p. 216). It supports a thriving commercial fishery for pink, chum, and sockeye salmon, Dungeness and tanner crabs, razor clams, herring and herring eggs, and is known to have commercial quanti-

ties of other species which have not yet been fished (FIS, Vol. 3, pp. 370-373). Moreover, it is used extensively by recreationists for salt and fresh water fishing, sightseeing, and photography. Its abundant porpoises, seals, sea otters, and sea lions, the beauty of its rugged shoreline scalloped by bays and fjords, and its backdrop of steep mountains and glaciers that creep down to water's edge afford visitors a unique wilderness experience (FIS, Vol. 2, p. 216; Vol. 3, pp. 399-402). The vast Northeast Pacific is similarly used for recreation and commercial fishing. It "is now relatively unpolluted compared to much of the remainder of the world's oceans" (FIS, Vol. 4, p. 542). Along the entire tanker route, "there is little history of casualties resulting in pollution . . ." (FIS, Vol. 3, p. 417).

"[A]ccidents and unintentional discharges would occur in spite of full utilization of technological advances and the most stringent regulations" (FIS, Vol. 1, p. 205). In an average year as much as 140,000 barrels of oil may be spilled into the marine environment as a result of tanker casualties (grounding and collisions) (FIS, Vol. 4, p. 474); additional quantities could be pumped directly into ocean waters during tank cleaning operations (FIS, Vol. 3, pp. 420-426; Vol. 4, p. 469); and there will be a continual intentional discharge of oil from a ballast treatment plant at Port Valdez, causing chronic pollution of Prince William Sound (FIS, Vol. 4, p. 467).

According to statistics prepared by the Environmental Protection Agency, less than five percent of oil spilled is recovered (FIS, Vol. 4, p. 484). Large spills in Prince William Sound "would be more difficult to contain, clean-up, and restore" than spills in other areas of the country because "of the distances from sources of ships and cleanup gear and the generally limited available manpower in the region" (FIS, Vol. 4, p. 484). "[U]nless extraordinary advances in oil containment and recovery

techniques occur, almost all of the oil spilled by the tanker system would constitute an adverse impact on the marine ecosystem" (FIS, Vol. 1, p. 225).

Any attempt to predict the impact on the marine environment is hampered by: (1) lack of basic information concerning many types of oil toxicity mechanisms; (2) difficulty in predicting the frequency and location of spills; and (3) lack of baseline data on biotic resources (FIS, Vol. 4, p. 196). "[T]he available information on potential effects of oil pollution reveals more unknowns than proven conclusions." It is "not at all clear what the acute and long-term effects of oil upon the environment and living marine resources . . . would be" (FIS, Vol. 4, p. 623). "[T]here have not been sufficient studies . . . to describe the long-term effects of sublethal levels of oil pollution" (FIS, Vol. 4, p. 202). "[V]ery little research has been directed toward identifying the less obvious effects of oil pollution due to intentional discharge at sea" (FIS, Vol. 4, p. 204).

Existing hydrographic surveys are inadequate for practically every area that the proposed marine transport system will traverse from Port Valdez to Southern California (FIS, Vol. 3, pp. 162-164, 168-169, 174, 177). And, at this late date—some three and one-half years after the oil companies selected Valdez as their southern terminus—"little is known about the climatology of Prince William Sound" (FIS, Vol. 3, p. 101) and "very few data concerning wind speeds [have] been collected at Valdez" (FIS, Vol. 3, p. 102).

Even in the one area where it is known that there will be the intentional discharge of oil into the sea—the ballast treatment plant at Valdez—"the path[s] that the oil would take . . . cannot be predicted with the available information and the overall pollution level for Port Valdez . . . cannot be accurately predicted" (FIS, Vol. 6, p.

80). Thus, "the intentional discharge of ballast waters . . . would have some likelihood of becoming a threat to the various parts of the marine ecosystem . . . but the impact cannot be evaluated because of the variables involved" (FIS, Vol. 4, p. 216).

3. Impact of the Gas Pipeline

Each of the three trans-Canada gas pipeline routes considered in the Impact Statement measures more than 1,500 miles from Prudhoe Bay to Edmonton, Alberta (FIS, Vol. 5, pp. 138, 150, 161, 172). The Impact Statement devotes a total of eleven pages to its primary evaluation of the environmental impact of a gas pipeline along either of these three routes (FIS, Vol. 4, pp. 492-503), and it explains that "lack of detailed information on specific routes and facilities obviously limits the impact analysis" (FIS, Vol. 1, p. 176).

"[M]any of [the] adverse effects" of oil pipeline construction "would be the same for the gas transportation system selected." Like the oil pipeline, "construction of an arctic gas pipeline would leave a permanent mark on the landscape," although the impact of operation would be less than for an oil pipeline due to the temperature of transported gas, the general burial of the line, and the lessened impact of pipeline rupture (Vol. 4, pp. 492, 503, 583).

Each of the gas pipeline routes would have substantial environmental impacts on wilderness, fish, and wildlife over and above those associated with the oil pipeline segment of the proposal (FIS, Vol. 4, pp. 495-503; Vol. 5, pp. 143, 147). Although it is acknowledged that "it is probable that economies of . . . environmental impact will result from moving oil and gas through a common corridor," "the extent of such economies is not estimated" (ESA, Vol. I, p. C-23).

APPENDIX B

REPRESENTATIVE INDETERMINATES AND UNKNOWNS ACKNOWLEDGED IN THE FINAL IMPACT STATEMENT *

1. *Natural Gas, Common Corridor*

"[T]he operation of the pipeline system would lead to the extraction, transportation, and use of some unknown total quantity of oil and gas in excess of the presently known resources." (FIS, Vol. 4, p. 69).

* * * *

"The environmental impact of the gas transportation system that would necessarily accompany the crude oil transportation system is difficult to evaluate for several reasons. The most important reason is that no proposal describing a specific system or route has been received. It is therefore not certain what route or exactly what type of system would be proposed." (FIS, Vol. 4, p. 5).

* * * *

"Whatever mode is chosen for transportation of gas, it is probable that economies of transportation cost and environmental impact will result from moving oil and gas through a common corridor . . . The extent of such economies is not estimated in the present analysis." (ESA, Vol. I, Appendix C, p. 23).

* * * *

"[T]he various impacts [along a Canadian route] cannot be evaluated nearly as well as can be those of the proposed pipeline system because of the level of information available. . . ." (FIS, Vol. 5, p. 233).

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* This compilation is taken verbatim from Appendix B of the Appendices submitted by The Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth in conjunction with their Brief on National Environmental Policy Act Issues.

2. *Oil Spills: Likelihood, Effects and Cleanup*

a. *Likelihood, General Effects*

"In the event of a pipeline break, up to 50,000 barrels of oil could be drained from the pipeline after shutdown and valve closure. . . . Alyeska estimates that at peak throughput (2,000,000 bbl/day) an additional 8,333 barrels of oil could leak out during the 6 minutes required for pump station shut-down and valve closure. . . . The best leak detection capability expected after experience is estimated at 750 bbl/day. . . . Amounts of oil below this level could therefore be lost each day and not be detected by the line volume alarms." (FIS, Vol. 4, p. 135).

* * * *

"Atlantic Richfield calculated that a spill of 25,000 barrels from the proposed trans-Alaska pipeline in winter would cover 6.6 acres in level country. The size of upland areas that would be covered by lesser or greater quantities in winter or summer was not discussed. How far a given quantity of oil would flow across sloping terrain not crossed by streams was not discussed. . . . Based on Atlantic Richfield Company's calculations, it is assumed that a comparable spill in summer would cover many more than 6.6 acres. It is also assumed that Atlantic Richfield Company's calculations are based on a leak in an above ground part of the pipe. How far oil would travel from a leak in a buried part of the pipe is not known, but such oil would likely discharge to the surface where the pipe crosses stream channels or depressions." (FIS, Vol. 4, pp. 112-113).

* * * *

"The intentional discharge of ballast waters into the Gulf of Alaska, as presently permitted by state, federal and international regulations, and the accidental loss of oil could be a definite threat to the marine eco-

system, but the adverse effects cannot be precisely evaluated due to the variables involved. The currents in the Gulf of Alaska would circulate any spilled oil so that it could affect areas far distant from the original discharge site." (FIS, Vol. 4, pp. 542-543).

* * * *

"Present international conventions, national and state statutes and regulations, and Alyeska procedures are such that the proportion of the ballast and tank cleaning residues that would be discharged into the sea and into the ballast treatment facility cannot be accurately predicted." (FIS, Vol. 4, p. 469).

* * * *

"[T]he international discharge of ballast waters into the Gulf of Alaska, as presently permitted by state, federal and international regulations, would have some likelihood of becoming a threat to the various parts of the marine ecosystem, but the impact cannot be evaluated because of the variables involved." (FIS, Vol. 4, p. 216).

* * * *

"The path(s) that the oil would take after leaving the diffuser at depth in Port Valdez cannot be predicted with the available information and the overall oil pollution level for Port Valdez likewise cannot be accurately predicted." (FIS, Vol. 6, p. 80).

* * * *

"Microbial degradation of oil in Port Valdez would undoubtedly occur, but at an unknown rate and thus with unknown impact." (FIS, Vol. 4, p. 210).

* * * *

"[T]he oil spill threats that would be imposed by the existence of the operating pipeline system and tanker system . . . . cannot be accurately predicted in terms of oil loss frequency, location, or volume due to the com-

plexities of the systems, the variables, and the projection bases involved." (FIS, Vol. 4, pp. 4-5).

* * * *

"The northeast Pacific is now relatively unpolluted compared to much of the remainder of the world's oceans. The background hydrocarbon level is relatively low in Port Valdez and Prince William Sound, and even though it is not at all clear what the acute and long-term effects of oil upon the environment would be, it is expected that the biological effects would be most apparent in these areas." (FIS, Vol. 4, p. 542).

* * * *

"It may be concluded then, that the components of the marine ecosystems are sufficiently dissimilar between the northern and southern portions of the route to expect a markedly different response to both acute and chronic low-level oil pollution. The theoretical bases and research data . . . are not adequate to permit accurate prediction of these responses however." (FIS, Vol. 4, p. 211).

b. *Effects on Fish and Wildlife*

"Predictions of the effects of North Slope crude oil on biotic systems of Alaska are nearly all limited by one or more of three general constraints: (1) basic information concerning many types of oil toxicity mechanisms is incomplete; (2) there is difficulty in predicting the frequency, volume, location and timing of oil losses which would occur along the proposed route; and (3) in many cases existing information about biotic resources is often insufficient for analytical use." (FIS, Vol. 4, p. 98).

* * * *

"A study of the available information on potential effects of oil pollution reveals more unknowns than proven conclusions. It thus is not at all clear what the acute and long-term effects of oil upon the environment and

living marine resources of a region would be." (FIS, Vol. 4, p. 623).

* * * *

"Studies of the effects of chronic and low-level pollution upon subadult, larval and egg stages and the causes for changes in survival are extremely limited. Simply measuring plankton volume or counting species to evaluate the impact of an oil spill may not detect the psysiological effects." (FIS, Vol. 4, p. 625).

* * * *

"[T]he consequences of pollutant hydrocarbons in marine ecosystems is as yet not understood." (FIS, Vol. 4, p. 626).

* * * *

"Virtually no information is available, however, on the effects of crude oil on large mammals, as a result of direct contact or ingestion . . . The amount of oil which could be ingested before acute effects results is not known and presumably would vary between species." (FIS, Vol. 4, p. 171).

* * * *

"Adequate studies on oil pollution and its effect on the reproductive capability of fish and invertebrates appear not to have been done." (FIS, Vol. 4, p. 199).

* * * *

"There have not been sufficient studies, however, to describe the long-term effects of sublethal levels of oil pollution." (FIS, Vol. 4, p. 202).

* * * *

"Very little research has been directed toward identfying the less obvious effects of oil pollution due to intentional discharge at sea." (FIS, Vol. 4, p. 204).

* * * *

"The impact on beach utilizing mammals of oil hydrocarbons that have become entrained in the marine eco-

system from chronic low-level sources is unknown, but some of the possible ramifications are discussed in the appendix to this volume." (FIS, Vol. 4, p. 248).

* * * *

"The effect on fur seals of petroleum products in the marine environment can only be inferred." (FIS, Vol. 3, p. 249).

* * * *

"Waterfowl losses from oil reaching the deltas of the Yukon and Copper Rivers could be serious both because densities of birds are great and because some species and races are unique to these areas. The occurrence of such events cannot be predicted nor the results evaluated because of the uncertainties involved." (FIS, Vol. 4, pp. 191-192).

* * * *

"Birds and their habitat along the routes from Valdez to southern terminals would be affected by this marine system. The magnitude of the effects on this internationally important resource is unpredictable because of the many variables involved. These variables include the magnitude and nature of oil that could be spilled and the numbers and distribution of birds." (FIS, Vol. 4, p. 222).

* * * *

"Although the relative toxicity of North Slope crude oil to birds is not known, many refined petroleum materials are known to be lethally toxic to waterbirds." (FIS, Vol. 4, p. 229).

c. *Cleanup and Rehabilitation*

"The most significant impacts of the proposed pipeline upon fishery resources of the Beaufort Sea would occur with the spillage of oil. . . . The most serious problems would perhaps occur if oil were discharged under the

ice, since there is no known way to effectively clean up such a spill. . . ." (FIS, Vol. 4, p. 136).

* * * *

"Contingency plans should be directed toward first preventing and minimizing the chance for wildlife to become contaminated by oil and, second, rehabilitating those animals that are contaminated with oil. Techniques for solving both problems are presently either ineffective or untested and warrant efforts to perfect them." (FIS, Vol. 4, pp. 310-311).

* * * *

"Equipment and methodology do not now exist for the control and cleanup of large oil spills without significant environmental stress. This would be true for most small spills as well along much of the tanker route, and is especially true in the Subarctic." (FIS, Vol. 4, p. 543).

* * * *

"The Alaskan area presents a different situation than the west coast. The remoteness of the [Alaskan] area makes logistic support much more difficult to provide. At the present time there is very little response to polluting spills, not only in Valdez but in the entire area." (FIS, Vol. 4, p. 483).

* * * *

"Oil of varying sorts can be cleaned from the plumage of birds with several kinds of cleaners, but so far there is no convincing evidence that the natural water repelling qualities can be restored to the cleaned feathers by known means . . . ." (FIS, Vol. 4, pp. 232-233).

* * * *

"Alyeska Pipeline Service Company . . . intends to attempt rehabilitation of only the endangered species that are contaminated in the Port Valdez area. Their methods of rehabilitation, including cleaning, restoration of plum-

age, rearing procedures and facilities, have not been described." (FIS, Vol. 4, p. 234).

3. *Marine*

a. *Physical and Chemical Oceanography*

"Basic hydrographic surveys of Port Valdez were made in 1966. . . . However, because of the possible presence of pinnacle rocks, wire drag surveys, particularly along the shoreline, are recommended before deep draft tankers operate in the area." (FIS, Vol. 3, pp. 162, 163).

* * * *

"One of the 1966 surveys of Port Valdez extended into the northern part of Valdez Narrows. The most recent survey of the southern part is dated 1902 and is inadequate." (FIS, Vol. 3, p. 163).

* * * *

"[S]urveys for 90% of [Prince William Sound] area date from 1902 to 1914 and are inadequate for accurate modern navigation data analysis . . . . The March 1964 earthquake caused a bottom uplift of from four to 32 feet in Prince William Sound. (FIS, Vol. 3, p. 164).

* * * *

"Hydrographic survey coverage for the entire [Gulf of Alaska] area is poor." (FIS, Vol. 3, p. 168).

* * * *

"Basic hydrographic survey coverage for the [Northeast Pacific] area is . . . considered inadequate except for . . . 1). small, isolated sections along the U.S. mainland coastline, 2). a 176,000 square mile area west of San Francisco, California, surveyed in 1960-66." (FIS, Vol. 3, p. 169).

* * * *

"Basichydrographic survey coverage for the western 50 miles of U.S. Strait of Juan de Fuca waters is . . .

considered inadequate for modern navigation requirements." (FIS, Vol. 3, p. 174).

* * * *

"Surveys [of Southern California] are considered inadequate. One survey of the area, from the Mexico-United States boundary and proceeding northward, started in 1968 and is expected to continue for the next several years." (FIS, Vol. 3, p. 177).

* * * *

"The National Marine Fisheries Service has a research program underway and intends to take limited special current measurements in the Port Valdez area. However, for good knowledge of the currents of this area a true circulatory survey is needed." (FIS, Vol. 3, p. 192).

* * * *

"Although oceanographic studies are continuing in Port Valdez, sufficient data are not yet on hand to accurately predict the diffusion and distribution of hydrocarbons discharged from the terminal operation." (FIS, Vol. 4, p. 208).

* * * *

" 'To understand the circulation and flushing characteristics of Port Valdez a year-round hydrographic and current sampling program and a very detailed study of tidal changes in chemical parameters of the waters will be necessary.' " (FIS, Vol. 4, p. 210).

* * * *

"A study in Valdez Arm by the University of Alaska is proposed to deal specifically with the chemical aspects of marine oil pollution. Limited temperature and salinity data are presented in the section on circulation of Prince William Sound." (FIS, Vol. 3, p. 206).

b. *Climate and Weather*

Data contained in summaries are based on observation by ships in passage, which tend to avoid bad weather

whenever possible, "thus biasing the data toward good weather samples." (FIS, Vol. 3, p. 66).

* * * *

"Little is known about the climatology of Prince William Sound. . . A meteorological observing station should be established in Prince William Sound as soon as possible. An instrumented bouy [sic] close to the shipping channel could obtain observations representative of conditions in the open sound." (FIS, Vol. 3, p. 101).

* * * *

"Very few data concerning wind speeds has been collected at Valdez." (FIS, Vol. 3, p. 102).

c. *Marine Aquatic Vegetation*

"Little detailed information concerning marine aquatic vegetation is available for the coast between Port Valdez and Puget Sound and for Alaskan waters in general. The information on marine algae is particularly limited for no mapping or repetitive sampling has taken place in that entire area." (FIS, Vol. 3, p. 221).

* * * *

"Planktonic plants are the only important plants in the open sea, but in the shallow waters rooted aquatic plants can develop. In addition to the higher plants there is a large algae (kelp and seaweed) production, plus an unknown microflora which, though not assessed, is thought to be of tremendous biological importance." (FIS, Vol. 3, pp. 233-234).

* * * *

"The impact of the proposed project on plankton along the tanker route cannot be completely evaluated other than to expect that some part of the plankton resource would disappear in certain locations and that the disappearance would, in turn, affect other parts of the marine ecosystem." (FIS, Vol. 4, p. 212).

* * * *

d. *Biologic Oceanography*

"Marine mammals of the Beaufort Sea are known with respect to species and biology, but poorly known in terms of numerical abundance." (FIS, Vol. 2, p. xlii).

* * * *

"Predictions of the effects of North Slope crude oil upon biotic systems of the marine environment are nearly all faced with one or more of three general constraints: (1) basic information concerning many types of oil toxicity mechanisms is incomplete; (2) there is difficulty in predicting the frequency, volume, location and timing of oil losses which would occur along the proposed route; and (3) existing information upon biotic resources is often insufficient for analytical use." (FIS, Vol. 4, p. 196).

4. *Wildlife*

"[T]he geographic, temporal, and numerical distributions of the fish, bird, and wildlife populations are known only within rather broad limits and the extent of knowledge varies from species to species and topic to topic." (FIS, Vol. 4, p. 4).

a. *Mammals*

"Because of the limited research that has been done to date on the behavior of wild animals, the significance of the disruption of behavior patterns on the wellbeing of wildlife cannot be fully evaluated. It is known, however, that disturbance during and immediately following birth can result in substantial decrease in survival of the new born young in moose . . . , mountain sheep . . . , and caribou . . . ." (FIS, Vol. 4, p. 149).

* * * *

"The effect of the above-ground portions of the pipeline on movements of large mammals cannot be conclusively predicted. Knowledge of the behavioral reaction of large mammals to obstructions is as yet quite limited, and there is not sufficient experience nor has the research been completed to provide a sound basis for the design and spacing of animal crossing facilities." (FIS, Vol. 4, p. 153).

* * * *

"Further deterrents to the movement of animals across the above-ground portion of the pipeline would be the possibility of the presence of odors from the insulation or other materials used in the pipe construction which the animals might react to and the possible influence of sound generated by the flowing oil in the pipeline. Neither the frequency and intensity of sounds which would be generated by the pipe, nor the muffling effect of the pipeline insulation, are now known." (FIS, Vol. 4, p. 159).

* * * * *

"A noise level of 74 decibels at 600 feet from a pump station is estimated from a total accoustical band spectrum. . . . The effects of these noise levels on various animals are unknown." (FIS, Vol. 1, p. 113).

b. *Birds*

"Except for a few species and races, information on seasonal distribution and numbers, breeding biology, habitat requirements and migration routes for most bird species within the State and adjacent marine waters is scanty at best and usually either fragmentary or generalized. Correspondingly, information regarding the status of many species of birds within the zone-of-influence of the proposed pipeline and attendant facilities is poor; and much of it is circumstantially based upon findings

from unrelated investigations in other parts of the State." (FIS, Vol. 2, p. 163).

* * * *

"Population estimates for most non-game species are almost nonexistent." (FIS, Vol. 2, p.190).

* * * *

"[a] better appreciation of the importance of . . . offshore areas to birds is yet to be gained and some pertinent studies have just been initiated." (FIS, Vol. 2, p. 175).

* * * *

"Affinities of these nonbreeding waterfowl to their breeding populations elsewhere and of breeding waterfowl to wintering areas in the south have not been determined for most species." (FIS, Vol. 2, pp. 182-183).

* * * *

"The peregrine falcon also occurs in the Sound wherever there is suitable habitat. Little is known about their distribution and abundance. It is not know if the race found there is the coastal Falco peregrinus peali or the endangered F.p. annatum." (FIS, Vol. 3, p. 320).

c. *Insects*

"The insects of Alaska are not scientifically well known and systematic study of Alaskan species has only recently started." (FIS, Vol. 2, p. 149).

* * * *

"There is little doubt then that oil lost in an accident would have an adverse, short-term direct impact particularly on those insects in an aquatic environment. The indirect and long-term impacts . . . upon aquatic insects in the Alaska environment are unknown." (FIS, Vol. 4, p. 195).

5. *Fishery Resources*

"Knowledge of the life histories and population dynamics of the fishes in this area [Sagavanirktok River] is extremely limited." (FIS, Vol. 2, p. 154).

* * * *

"Very little is known of the fishes of the Beaufort Sea." (FIS, Vol. 2, p. 153).

"It is difficult to predict potential impacts when the state of knowledge about the fishery resources is incomplete and the proposed action is complex and involves many variables, only some of which are completely controllable." (FIS, Vol. 4, p. 125).

* * * *

"Streams that do not contain anadromous species of fish have generally received less attention. In fact, many of these waters have never been sampled or studied in any manner." (FIS, Vol. 4, p. 125).

* * * *

"The most serious remaining problems [regarding fish] would likely be caused by a number of unknowns." (FIS, Vol. 4, p. 133).

* * * *

"Detailed information is not available on the economic structure of Alaska's fisheries industry." (FIS, Vol. 4, p. 432).

* * * *

"Some approximation could be made of the losses to fishermen that would result from oil pollution associated with the project. The secondary effects or service and support facilities and the impact that a reduc ! multiplier effect would have on the general economy could only be speculated upon." (FIS, Vol. 4, p. 432).

* * * *

"Damage to shellfish resources elsewhere [than Port Valdez] along the coast would depend upon location, timing, and extent of spills and cannot be predicted because of these variables." (FIS, Vol. 4, p. 213).

* * * *

"The extent of loss [of herring eggs and larvae] to the fishermen cannot be predicted from available information." (FIS, Vol. 4, p. 434).

* * * *

"The effects of project operations upon the current and potential harvest of . . . finfish [other than salmon] resources cannot be estimated from current knowledge." (FIS, Vol. 4, p. 434).

* * * *

"Effects of oil pollution on the fisheries north and west of Prince William Sound are uncertain." (FIS, Vol. 4, p. 436).

"Spawning areas in the remainder of the [Prince William] Sound could be affected by spills occurring during the spawning period. The extent of loss to the fishermen cannot be predicted from available information. . . ." (FIS, Vol. 4, p. 434).

* * * *

"The harvest of clams, oysters and Dungeness crabs south of Prince William Sound bring the fishermen about $17 million annually. It is likely that losses to these fisheries could occur periodically as a result of the marine transport of oil, but the timing and extent of these losses cannot be predicted." (FIS, Vol. 4, p. 436).

6. *Geology*

a. *Earthquakes*

"Any point along the southern two-thirds of the proposed pipeline route could be subjected to a large-magnitude

earthquake (greater than 7.0 on the Richter Scale) and the probability that one or more large-magnitude earthquakes would occur in the vicinity of this portion of the proposed route during the lifetime of the pipeline is extremely high, in fact, almost a certainty." (FIS, Vol. 4, p. 518).

* * * *

"The proposed route intersects several recognized major faults in the active seismic region south of 67° N latitude; however, except for the Denali fault, which displays abundant geologic evidence of large Holocene offset (Richter and Matson, 1971), the risk of significant tectonic movement on these faults is essentially unknown at present. Many additional faults are also postulated, particularly in the segments 67° N to Donnelly Dome and Willow Lake to Valdez. Both of these segments are characterized by the frequent occurrence of sizeable earthquakes that have yet to be identified with individual faults." (FIS, Vol. 2, p. 11).

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"In July 1937, a magnitude 7.3 earthquake occurred southeast of Fairbanks. Landslides, mud boils, and ground fissures were observed (Bramhall, 1938) within 10 miles of the proposed pipeline route. On June 21, 1967, a series of three magnitude 5.5 shocks occurred within a few miles of the route. . . . In this section of the route, the seismic risk is substantial, although it cannot be correlated with recognizable tectonic features." (FIS, Vol. 2, p. 29).

* * * *

"The Kenai-Chugach Mountains are extremely active techtonically, which is demonstrated by the large number of earthquakes occurring in this section, and undoubtedly, faults are present. . . . However, it is difficult to locate fault zones in this area because of the uniform character of the bedrock and because of its

altered or metamorphosed character." (FIS, Vol. 2, p. 38).

* * * *

"Other significant engineering problems include extremely steep bedrock slopes to traverse in the Keystone Canyon and Thompson Pass areas, now unrecognized active fault zones, avalanche hazards locally between Keystone Canyon and Ernestine, and the large, probably inactive, landslide near Fort Liscum." (FIS, Vol. 2, p. 39).

* * * *

"The proposed pipeline also may cross a fault about one mile north of Grayling Lake. No evidence has been found to indicate whether the faults are active or inactive. Additional investigations will be required to determine the potential activity of these faults." (FIS, Vol. 4, p. 38).

* * * *

"The pipeline in this segment of the route would cross 2 faults in the vicinity of Fish Creek and may cross a third fault about 3 miles south of Prospect Creek. No evidence has been found to indicate whether these faults are active or inactive. Additional studies are required to determine the potential activity of the faults." (FIS, Vol. 4, p. 40).

* * * *

"The proposed pipeline would cross mapped faults at Aggie Creek, Globe Creek and 2 miles north of Globe Creek. In addition, 3 other faults were recognized in this segment and may extend across the pipeline alignment. . . . No evidence has been found to indicate whether or not the faults are active. A further study must be made to determine which of the faults cross the route alignment, and the activity of all of the faults." (FIS, Vol. 4, p. 44).

* * * *

"Although no faults have been delineated . . . the Kenai-Chugach Mountains are extremely active tectonically, and undoubtedly, faults are present." (FIS, Vol. 4, p. 52).

b. *Erosion*

"It is questionable whether or not the proposed construction pad thickness, in many places, is sufficient to prevent deleterious thawing of permafrost and thickening of the active layer. If the permafrost thaws, differential settlement or slope failure could occur locally, especially where the pad is underlain by ice-rich sediments. This problem could be severe on slopes and where drainage is impeded. Locally, where the temperature of the permafrost is close to 0°C, the thickness of the construction pad required to prevent thawing of the permafrost could be so great that it would be inadvisable to construct the pad." (FIS, Vol. 4, p. 24).

* * * *

"The amount of erosion to be expected due to construction activities cannot be predicted with any degree of precision because (1) the project description doesn't give important 'as-built' details, (2) the probability and extent of future floods, icings, and ice-jams are unknown, (3) the erosion effects of floods are difficult to evaluate, and (4) the success of erosion-control methods is unpredictable." (FIS, Vol. 4, p. 78).

c. *Soils Investigation*

"[A] large part of the route north of the Yukon River and some parts south of the Yukon River need further study." (FIS, Vol. 4, p. 10).

7. *Vegetation*

"Mosses and lichens make up a large part of tundra vegetation . . . but little is known about reproduction and growth rates in arctic regions." (FIS, Vol. 2, p. 125).

* * * *

"Most studies of reproduction and growth in larch have been made within its commercial range in the Lake States and southeastern Canada. No data are available from Alaska. . . . The behavior of seedlings and growth to maturity in Alaska cannot, with validity, be extrapolated from data available." (FIS, Vol. 2, p. 139).

* * * *

"Little is known of the frequency and quantity of seed produced by tundra species. . . . Also almost nothing is known of the percent of viable seed that are produced. . . . The reasons for the apparent slow rate of reproduction of tundra species can be presented only as hypotheses in the absence of continued observations." (FIS, Vol. 2, pp. 124-125).

* * * *

"Sites of 27 rare plant species are along or close to the pipeline alignment. . . . For some species, these locations are the only places where they are known; for other species they are the only known Alaska stations, but the species grow elsewhere." (FIS, Vol. 4, p. 109).

* * * *

"There are no methods to remove oil from terrestrial surfaces without destruction of vegetation on those surfaces." (FIS, Vol. 4, p. 113).

* * * *

"Gravel work pads, if not removed following construction completion, very likely would remain bare for many years because of compaction by the heavy machinery. No Alaskan experience on the rate of seedling establishment on compacted, coarse materials is known." (FIS, Vol. 4, p. 100).

8. *Air Quality*

"Air quality data are not available for the part of Alaska that would be crossed by the proposed pipeline route." (FIS, Vol. 2, p. xxxiii).

* * * *

"The available information does not fully describe the emissions that would occur. . . . It is therefore not possible to evaluate the effect of the emissions on the local environment because the emission levels are not known." (FIS, Vol. 4, p. 96).

* * * *

"No estimates of volume of camp waste to be processed are available and the anticipated emission levels for different pollutants are unknown at this time. No evaluation of the effects of the contaminants is therefore possible." (FSI, Vol. 4, pp. 86, 88).

APPENDIX C

PUBLIC LAW 93-153; 87 STAT. 576

An Act to amend section 28 of the Mineral Leasing Act of 1920, and to authorize a trans-Alaska oil pipeline, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

TITLE I

Section 101. Section 28 of the Mineral Leasing Act of 1920 (41 Stat. 449), as amended (30 U.S.C. 185),[92] is further amended to read as follows:

"Grant of Authority

"Sec. 28. (a) Rights-of-way through any Federal lands may be granted by the Secretary of the Interior or appropriate agency head for pipeline purposes for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom to any applicant possessing the qualifications provided in section 1 of this Act, as amended, in accordance with the provisions of this section.

"Definitions

"(b)(1) For the purposes of this section 'Federal lands' means all lands owned by the United States except lands in the National Park System, lands held in trust for an Indian or Indian tribe, and lands on the Outer Continental Shelf. A right-of-way through a Federal reservation shall not be granted if the Secretary or agency head determines that it would be inconsistent with the purposes of the reservation.

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[92] 30 U.S.C.A. § 185.

"(2) 'Secretary' means the Secretary of the Interior.

"(3) 'Agency head' means the head of any Federal department or independent Federal office or agency, other than the Secretary of the Interior, which has jurisdiction over Federal lands.

"Inter-Agency Coordination

"(c)(1) Where the surface of all of the Federal lands involved in a proposed right-of-way permit is under the jurisdiction of one Federal agency, the agency head, rather than the Secretary, is authorized to grant or renew the right-of-way or permit for the purposes set forth in this section.

"(2) Where the surface of the Federal lands involved is administered by the Secretary or by two or more Federal agencies, the Secretary is authorized, after consultation with the agencies involved, to grant or renew rights-of-way or permits through the Federal lands involved. The Secretary may enter into intragency agreements with all other Federal agencies having jurisdiction over Federal lands for the purpose of avoiding duplication, assigning responsibility, expediting review of rights-of-way or permit applications, issuing joint regulations, and assuring a decision based upon a comprehensive review of all factors involved in any right-of-way or permit application. Each agency head shall administer and enforce the provisions of this section, appropriate regulations, and the terms and conditions of rights-of-way or permits insofar as they involve Federal lands under the agency head's jurisdiction.

"Width Limitations

"(d) The width of a right-of-way shall not exceed fifty feet plus the ground occupied by the pipeline (that is, the pipe and its related facilities) unless the Secre-

tary or agency head finds, and records the reasons for his finding, that in his judgment a wider right-of-way is necessary for operation and maintenance after construction, or to protect the environment or public safety. Related facilities include but are not limited to valves, pump stations, supporting structures, bridges, monitoring and communication devices, surge and storage tanks, terminals, roads, airstrips and campsites, and they need not necessarily be connected or contiguous to the pipe and may be the subjects of separate rights-of-way.

"Temporary Permits

"(e) A right-of-way may be supplemented by such temporary permits for the use of Federal lands in the vicinity of the pipeline as the Secretary or agency head finds are necessary in connection with construction, operation, maintenance, or termination of the pipeline, or to protect the natural environment or public safety.

"Regulatory Authority

"(f) Rights-of-way or permits granted or renewed pursuant to this section shall be subject to regulations promulgated in accord with the provisions of this section and shall be subject to such terms and conditions as the Secretary or agency head may prescribe regarding extent, duration, survey, location, construction, operation, maintenance, use, and termination.

"Pipeline Safety

"(g) The Secretary or agency head shall impose requirements for the operation of the pipeline and related facilities in a manner that will protect the safety of workers and protect the public from sudden ruptures and slow degradation of the pipeline.

"Environmental Protection

"(h)(1) Nothing in this section shall be construed to amend, repeal, modify, or change in any way the requirements of section 102(2)(C) or any other provision of the National Environmental Policy Act of 1969 (Public Law 91-190, 83 Stat. 852).

"(2) The Secretary or agency head, prior to granting a right-of-way or permit pursuant to this section for a new project which may have a significant impact on the environment, shall require the applicant to submit a plan of construction, operation, and rehabilitation for such right-of-way or permit which shall comply with this section. The Secretary or agency head shall issue regulations or impose stipulations which shall include, but shall not be limited to: (A) requirements for restoration, revegetation, and curtailment of erosion of the surface of the land; (B) requirements to insure that activities in connection with the right-of-way or permit will not violate applicable air and water quality standards nor related facility siting standards established by or pursuant to law; (C) requirements designed to control or prevent (i) damage to the environment (including damage to fish and wildlife habitat), (ii) damage to public or private property, and (iii) hazards to public health and safety; and (D) requirements to protect the interests of individuals living in the general area of the right-of-way or permit who rely on the fish, wildlife, and biotic resources of the area for subsistence purposes. Such regulations shall be applicable to every right-of-way or permit granted pursuant to this section, and may be made applicable by the Secretary or agency head to existing rights-of-way or permits, or rights-of-way or permits to be renewed pursuant to this section.

"Disclosure

"(i) If the applicant is a partnership, corporation, association, or other business entity, the Secretary or agency head shall require the applicant to disclose the identity of the participants in the entity. Such disclosure shall include where applicable (1) the name and address of each partner, (2) the name and adress of each shareholder owning 3 per centum or more of the shares, together with the number and percentage of any class of voting shares of the entity which such shareholder is authorized to vote, and (3) the name and address of each affiliate of the entity together with, in the case of an affiliate controlled by the entity, the number of shares and the percentage of any class of voting stock of that affiliate owned, directly or indirectly, by that entity, and, in the case of an affiliate which controls that entity, the number of shares and the percentage of any class of voting stock of that entity owned, directly or indirectly, by the affiliate.

"Technical and Financial Capability

"(j) The Secretary or agency head shall grant or renew a right-of-way or permit under this section only when he is satisfied that the applicant has the technical and financial capability to construct, operate, maintain, and terminate the project for which the right-of-way or permit is requested in accordance with the requirements of this section.

"Public Hearings

"(k) The Secretary or agency head by regulation shall establish procedures, including public hearings where appropriate, to give Federal, State, and local government agencies and the public adequate notice and an opportunity to comment upon right-of-way applications filed after the date of enactment of this subsection.

"Reimbursement of Costs

"(l) The applicant for a right-of-way or permit shall reimburse the United States for administrative and other costs incurred in processing the application, and the holder of a right-of-way or permit shall reimburse the United States for the costs incurred in monitoring the construction, operation, maintenance, and termination of any pipeline and related facilities on such right-of-way or permit area and shall pay annually in advance the fair market rental value of the right-of-way or permit, as determined by the Secretary or agency head.

"Bonding

"(m) Where he deems it appropriate the Secretary or agency head may require a holder of a right-of-way or permit to furnish a bond, or other security, satisfactory to the Secretary or agency head to secure all or any of the obligations imposed by the terms and conditions of the right-of-way or permit or by any rule or regulation of the Secretary or agency head.

"Duration of Grant

"(n) Each right-of-way or permit granted or renewed pursuant to this section shall be limited to a reasonable term in light of all circumstances concerning the project, but in no event more than thirty years. In determining the duration of a right-of-way the Secretary or agency head shall, among other things, take into consideration the cost of the facility, its useful life, and any public purpose it serves. The Secretary or agency head shall renew any right-of-way in accordance with the provisions of this section, so long as the project is in commercial operation and is operated and maintained in accordance with all of the provisions of this section.

"Suspension or Termination of Right-of-Way

"(o)(1) Abandonment of a right-of-way or noncompliance with any provision of this section may be grounds for suspension or termination of the right-of-way if (A) after due notice to the holder of the right-of-way, (B) a reasonable opportunity to comply with this section, and (C) an appropriate administrative proceeding pursuant to title 5, United States Code, section 554, the Secretary or agency head determines that any such ground exists and that suspension or termination is justified. No administrative proceeding shall be required where the right-of-way by its terms provides that it terminates on the occurrence of a fixed or agreed upon condition, event, or time.

"(2) If the Secretary or agency head determines that an immediate temporary suspension of activities within a right-of-way or permit area is necessary to protect public health or safety or the environment, he may abate such activities prior to an administrative proceeding.

"(3) Deliberate failure of the holder to use the right-of-way for the purpose for which it was granted or renewed for any continuous two-year period shall constitute a rebuttable presumption of abandonment of the right-of-way: *Provided*, That where the failure to use the right-of-way is due to circumstances not within the holder's control the Secretary or agency head is not required to commence proceedings to suspend or terminate the right-of-way.

"Joint Use of Rights-of-Way

"(p) In order to minimize adverse environmental impacts and the proliferation of separate rights-of-way across Federal lands, the utilization of rights-of-way in common shall be required to the extent practical, and each right-of-way or permit shall reserve to the Secre-

tary or agency head the right to grant additional rights-of-way or permits for compatible uses on or adjacent to rights-of-way or permit area granted pursuant to this section.

"Statutes

"(q) No rights-of-way for the purposes provided for in this section shall be granted or renewed across Federal lands except under and subject to the provisions, limitations, and conditions of this section. Any application for a right-of-way filed under any other law prior to the effective date of this provision may, at the applicant's option, be considered as an application under this section. The Secretary or agency head may require the applicant to submit any additional information he deems necessary to comply with the requirements of this section.

"Common Carriers

"(r)(1) Pipelines and related facilities authorized under this section shall be constructed, operated, and maintained as common carriers.

"(2)(A) The owners or operators of pipelines subject to this section shall accept, convey, transport, or purchase without discrimination all oil or gas delivered to the pipeline without regard to whether such oil or gas was produced on Federal or non-Federal lands.

"(B) In the case of oil or gas produced from Federal lands or from the resources on the Federal lands in the vicinity of the pipeline, the Secretary may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine the proportionate amounts to be accepted, conveyed, transported or purchased.

"(3)(A) The common carrier provisions of this section shall not apply to any natural gas pipeline operated

by any person subject to regulation under the Natural Gas Act or by any public utility subject to regulation by a State or municipal regulatory agency having jurisdiction to regulate the rates and charges for the sale of natural gas to consumers within the State or municipality.

"(B) Where natural gas not subject to State regulatory or conservation laws governing its purchase by pipelines is offered for sale, each such pipeline shall purchase, without discrimination, any such natural gas produced in the vicinity of the pipeline.

"(4) The Government shall in express terms reserve and shall provide in every lease of oil lands under this Act that the lessee, assignee, or beneficiary, if owner or operator of a controlling interest in any pipeline or of any company operating the pipeline which may be operated accessible to the oil derived from lands under such lease, shall at reasonable rates and without discrimination accept and convey the oil of the Government or of any citizen or company not the owner of any pipeline operating a lease or purchasing gas or oil under the provisions of this Act.

"(5) Whenever the Secretary has reason to believe that any owner or operator subject to this section is not operating any oil or gas pipeline in complete accord with its obligations as a common carrier hereunder, he may request the Attorney General to prosecute an appropriate proceeding before the Interstate Commerce Commision or Federal Power Commission or any appropriate State agency or the United States district court for the district in which the pipeline or any part thereof is located, to enforce such obligation or to impose any penalty provided therefor, or the Secretary may, by proceeding as provided in this section, suspend or terminate the said grant of right-of-way for noncompliance with the provisions of this section.

"(6) The Secretary or agency head shall require, prior to granting or renewing a right-of-way, that the applicant submit and disclose all plans, contracts, agreements, or other information or material which he deems necessary to determine whether a right-of-way shall be granted or renewed and the terms and conditions which should be included in the right-of-way. Such information may include, but is not limited to: (A) conditions for, and agreements among owners or operators, regarding the addition of pumping facilities, looping, or otherwise increasing the pipeline or terminal's throughput capacity in response to actual or anticipated increases in demand; (B) conditions for adding or abandoning intake, offtake, or storage points or facilities; and (C) minimum shipment or purchase tenders.

"Right-of-Way Corridors

"(s) In order to minimize adverse environmental impacts and to prevent the proliferation of separate rights-of-way across Federal lands, the Secretary shall, in consultation with other Federal and State agencies, review the need for a national system of transportation and utility corridors across Federal lands and submit a report of his findings and recommendations to the Congress and the President by July 1, 1975.

"Existing Rights-of-Way

"(t) The Secretary or agency head may ratify and confirm any right-of-way or permit for an oil or gas pipeline or related facility that was granted under any provision of law before the effective date of this subsection, if it is modified by mutual agreement to comply to the extent practical with the provisions of this section. Any action taken by the Secretary or agency head pursuant to this subsection shall not be considered a major Federal action requiring a detailed statement pursuant

to section 102(2)(C) of the National Environmental Policy Act of 1970 (Public Law 90-190; 42 U.S.C. 4321).

"Limitations on Export

"(u) Any domestically produced crude oil transported by pipeline over rights-of-way granted pursuant to section 28 of the Mineral Leasing Act of 1920, except such crude oil which is either exchanged in similar quantity for convenience or increased efficiency of transportation with persons or the government of an adjacent foreign state, or which is temporarily exported for convenience or increased efficiency of transportation across parts of an adjacent foreign state and reenters the United States, shall be subject to all of the limitations and licensing requirements of the Export Administration Act of 1969 (Act of December 30, 1969; 83 Stat. 841) and, in addition, before any crude oil subject to this section may be exported under the limitations and licensing requirements and penalty and enforcement provisions of the Export Administration Act of 1969 the President must make and publish an express finding that such exports will not diminish the total quantity or quality of petroleum available to the United States, and are in the national interest and are in accord with the provisions of the Export Administration Act of 1969: *Provided*, That the President shall submit reports to the Congress containing findings made under this section, and after the date of receipt of such report Congress shall have a period of sixty calendar days, thirty days of which Congress must have been in session, to consider whether exports under the terms of this section are in the national interest. If the Congress within this time period passes a concurrent resolution of disapproval stating disagreement with the President's finding concerning the national interest, further exports made pursuant to the aforementioned Presidential findings shall cease.

"State Standards

"(v) The Secretary or agency head shall take into consideration and to the extent practical comply with State standards for right-of-way construction, operation, and maintenance.

"Reports

"(w)(1) The Secretary and other appropriate agency heads shall report to the House and Senate Committees on Interior and Insular Affairs annually on the administration of this section and on the safety and environmental requirements imposed pursuant thereto.

"(2) The Secretary or agency head shall notify the House and Senate Committees on Interior and Insular Affairs promptly upon receipt of an application for a right-of-way for a pipeline twenty-four inches or more in diameter, and no right-of-way for such a pipeline shall be granted until sixty days (not counting days on which the House of Representatives or the Senate has adjourned for more than three days) after a notice of intention to grant the right-of-way, together with the Secretary's or agency head's detailed findings as to terms and conditions he proposes to impose, has been submitted to such committees, unless each committee by resolution waives the waiting period.

"(3) Periodically, but at least once a year, the Secretary of the Department of Transportation shall cause the examination of all pipelines and associated facilities on Federal lands and shall cause the prompt reporting of any potential leaks or safety problems.

"(4) The Secretary of the Department of Transportation shall report annually to the President, the Congress, the Secretary of the Interior, and the Interstate Commerce Commission any potential dangers of or actual explosions, or potential or actual spillage on Federal lands

and shall include in such report a statement of corrective action taken to prevent such explosion or spillage.

"Liability

"(x)(1) The Secretary or agency head shall promulgate regulations and may impose stipulations specifying the extent to which holders of rights-of-way and permits under this Act shall be liable to the United States for damage or injury incurred by the United States in connection with the right-of-way or permit. Where the right-of-way or permit involves lands which are under the exclusive jurisdiction of the Federal Government, the Secretary or agency head shall promulgate regulations specifying the extent to which holders shall be liable to third parties for injuries incurred in connection with the right-of-way or permit.

"(2) The Secretary or agency head may, by regulation or stipulation, impose a standard of strict liability to govern activities taking place on a right-of-way or permit area which the Secretary or agency head determines, in his discretion, to present a foreseeable hazard or risk of danger to the United States.

"(3) Regulations and stipulations pursuant to this subsection shall not impose strict liability for damage or injury resulting from (A) an act of war, or (B) negligence of the United States.

"(4) Any regulation or stipulation imposing liability without fault shall include a maximum limitation on damages commensurate with the foreseeable risks or hazards presented. Any liability for damage or injury in excess of this amount shall be determined by ordinary rules of negligence.

"(5) The regulations and stipulations shall also specify the extent to which such holders shall indemnify or hold

harmless the United States for liability, damage, or claims arising in connection with the right-of-way or permit.

"(6) Any regulation or stipulation promulgated or imposed pursuant to this section shall provide that all owners of any interest in, and all affiliates or subsidiaries of any holder of, a right-of-way or permit shall be liable to the United States in the event that a claim for damage or injury cannot be collected from the holder.

"(7) In any case where liability without fault is imposed pursuant to this subsection and the damages involved were caused by the negligence of a third party, the rules of subrogation shall apply in accordance with the law of the jurisdiction where the damage occurred.

"Antitrust Laws

"(y) The grant of a right-of-way or permit pursuant to this section shall grant no immunity from the operation of the Federal antitrust laws."

TITLE II

SHORT TITLE

Sec. 201. This title may be cited as the "Trans-Alaska Pipeline Authorization Act".

CONGRESSIONAL FINDINGS

Sec. 202. The Congress finds and declares that:

(a) The early development and delivery of oil and gas from Alaska's North Slope to domestic markets is in the national interest because of growing domestic shortages and increasing dependence upon insecure foreign sources.

(b) The Department of the Interior and other Federal agencies, have, over a long period of time, conducted extensive studies of the technical aspects and of the environmental, social, and economic impacts of the proposed trans-Alaska oil pipeline, including consideration of a trans-Canada pipeline.

(c) The earliest possible construction of a trans-Alaska oil pipeline from the North Slope of Alaska to Port Valdez in that State will make the extensive proven and potential reserves of low-sulfur oil available for domestic use and will best serve the national interest.

(d) A supplemental pipeline to connect the North Slope with a trans-Canada pipeline may be needed later and it should be studied now, but it should not be regarded as an alternative for a trans-Alaska pipeline that does not traverse a foreign country.

CONGRESSIONAL AUTHORIZATION

Sec. 203. (a) The purpose of this title is to insure that, because of the extensive governmental studies already made of this project and the national interest in early delivery of North Slope oil to domestic markets, the trans-Alaska oil pipeline be constructed promptly without further administrative or judicial delay or impediment. To accomplish this purpose it is the intent of the Congress to exercise its constitutional powers to the fullest extent in the authorizations and directions herein made and in limiting judicial review of the actions taken pursuant thereto.

(b) The Congress hereby authorizes and directs the Secretary of the Interior and other appropriate Federal officers and agencies to issue and take all necessary action to administer and enforce rights-of-way, permits, leases, and other authorizations that are necessary for or

related to the construction, operation, and maintenance of the trans-Alaska oil pipeline system, including roads and airstrips, as that system is generally described in the Final Environmental Impact Statement issued by the Department of the Interior on March 20, 1972. The route of the pipeline may be modified by the Secretary to provide during construction greater environmental protection.

(c) Rights-of-way, permits, leases, and other authorizations issued pursuant to this title by the Secretary shall be subject to the provisions of section 28 of the Mineral Leasing Act of 1920, as amended by title I of this Act (except the provisions of subsections (h)(1), (k), (q), (w)(2), and (x)); all authorizations issued by the Secretary and other Federal officers and agencies pursuant to this title shall include the terms and conditions required, and may include the terms and conditions permitted, by the provisions of law that would otherwise be applicable if this title had not been enacted, and they may waive any procedural requirements of law or regulation which they deem desirable to waive in order to accomplish the purposes of this title. The direction contained in section 203(b) shall supersede the provisions of any law or regulation relating to an administrative determination as to whether the authorizations for construction of the trans-Alaska oil pipeline shall be issued.

(d) The actions taken pursuant to this title which relate to the construction and completion of the pipeline system, and to the applications filed in connection therewith necessary to the pipeline's operation at full capacity, as described in the Final Environmental Impact Statement of the Department of the Interior, shall be taken without further action under the National Environmental Policy Act of 1969; and the actions of the Federal officers concerning the issuance of the necessary rights-of-way, permits, leases, and other authorizations for construction

and initial operation at full capacity of said pipeline system shall not be subject to judicial review under any law except that claims alleging the invalidity of this section may be brought within sixty days following its enactment, and claims alleging that an action will deny rights under the Constitution of the United States, or that the action is beyond the scope of authority conferred by this title, may be brought within sixty days following the date of such action. A claim shall be barred unless a complaint is filed within the time specified. Any such complaint shall be filed in a United States district court, and such court shall have exclusive jurisdiction to determine such proceeding in accordance with the procedures hereinafter provided, and no other court of the United States, of any State, territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any such claim whether in a proceeding instituted prior to or on or after the date of the enactment of this Act. Any such proceeding shall be assigned for hearing at the earliest possible date, shall take precedence over all other matters pending on the docket of the district court at that time, and shall be expedited in every way by such court. Such court shall not have jurisdiction to grant any injunctive relief against the issuance of any right-of-way, permit, lease, or other authorization pursuant to this section except in conjunction with a final judgment entered in a case involving a claim filed pursuant to this section. Any review of an interlocutory or final judgment, decree, or order of such district court may be had only upon direct appeal to the Supreme Court of the United States.

(c) The Secretary of the Interior and the other Federal officers and agencies are authorized at any time when necessary to protect the public interest, pursuant to the authority of this section and in accordance with its provisions, to amend or modify any right-of-way,

permit, lease, or other authorization issued under this title.

LIABILITY

Sec. 204. (a)(1) Except when the holder of the pipeline right-of-way granted pursuant to this title can prove that damages in connection with or resulting from activities along or in the vicinity of the proposed trans-Alaskan pipeline right-of-way were caused by an act of war or negligence of the United States, other government entity, or the damaged party, such holder shall be strictly liable to all damaged parties, public or private, without regard to fault for such damages, and without regard to ownership of any affected lands, structures, fish, wildlife, or biotic or other natural resources relied upon by Alaska Natives, Native organizations, or others for subsistence or economic purposes. Claims for such injury or damages may be determined by arbitration or judicial proceedings.

(2) Liability under paragraph (1) of this subsection shall be limited to $50,000,000 for any one incident, and the holders of the right-of-way or permit shall be liable for any claim allowed in proportion to their ownership interest in the right-of-way or permit. Liability of such holders for damages in excess of $50,000,000 shall be in accord with ordinary rules of negligence.

(3) In any case where liability without fault is imposed pursuant to this subsection and the damages involved were caused by the negligence of a third party, the rules of subrogation shall apply in accordance with the law of the jurisdiction where the damage occurred.

(4) Upon order of the Secretary, the holder of a right-of-way or permit shall provide emergency subsistence and other aid to an affected Alaska Native, Native organization, or other person pending expeditious filing of, and determination of, a claim under this subsection.

(5) Where the State of Alaska is the holder of a right-of-way or permit under this title, the State shall not be subject to the provisions of subsection 204(a), but the holder of the permit or right-of-way for the trans-Alaska pipeline shall be subject to that subsection with respect to facilities constructed or activities conducted under rights-of-way or permits issued to the State to the extent that such holder engages in the construction, operation, maintenance, and termination of facilities, or in other activities under rights-of-way or permits issued to the State.

(b) If any area within or without the right-of-way or permit area granted under this title is polluted by any activities conducted by or on behalf of the holder to whom such right-of-way or permit was granted, and such pollution damages or threatens to damage aquatic life, wildlife, or public or private property, the control and total removal of the pollutant shall be at the expense of such holder, including any administrative and other costs incurred by the Secretary or any other Federal officer or agency. Upon failure of such holder to adequately control and remove such pollutant, the Secretary, in cooperation with other Federal, State, or local agencies, or in cooperation with such holder, or both, shall have the right to accomplish the control and removal at the expense of such holder.

(c)(1) Notwithstanding the provisions of any other law, if oil that has been transported through the trans-Alaska pipeline is loaded on a vessel at the terminal facilities of the pipeline, the owner and operator of the vessel (jointly and severally) and the Trans-Alaska Pipeline Liability Fund established by this subsection, shall be strictly liable without regard to fault in accordance with the provisions of this subsection for all damages, including clean-up costs, sustained by any person

or entity, public or private, including residents of Canada, as the result of discharges of oil from such vessel.

(2) Strict liability shall not be imposed under this subsection if the owner or operator of the vessel, or the Fund, can prove that the damages were caused by an act of war or by the negligence of the United States or other governmental agency. Strict liability shall not be imposed under this subsection with respect to the claim of a damaged party if the owner or operator of the vessel, or the Fund, can prove that the damage was caused by the negligence of such party.

(3) Strict liability for all claims arising out of any one incident shall not exceed $100,000,000. The owner and operator of the vessel shall be jointly and severally liable for the first $14,000,000 of such claims that are allowed. Financial responsibility for $14,000,000 shall be demonstrated in accordance with the provisions of section 311(p) of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1321(p)) before the oil is loaded. The Fund shall be liable for the balance of the claims that are allowed up to $100,000,000. If the total claims allowed exceed $100,000,000, they shall be reduced proportionately. The unpaid portion of any claim may be asserted and adjudicated under other applicable Federal or state law.

(4) The Trans-Alaska Pipeline Liability Fund is hereby established as a non-profit corporate entity that may sue and be sued in its own name. The Fund shall be administered by the holders of the trans-Alaska pipeline right-of-way under regulations prescribed by the Secretary. The Fund shall be subject to an annual audit by the Comptroller General, and a copy of the audit shall be submitted to the Congress.

(5) The operator of the pipeline shall collect from the owner of the oil at the time it is loaded on the vessel

a fee of five cents per barrel. The collection shall cease when $100,000,000 has been accumulated in the Fund, and it shall be resumed when the accumulation in the Fund falls below $100,000,000.

(6) The collections under paragraph (5) shall be delivered to the Fund. Costs of administration shall be paid from the money paid to the Fund, and all sums not needed for administration and the satisfaction of claims shall be invested prudently in income-producing securities approved by the Secretary. Income from such securities shall be added to the principal of the Fund.

(7) The provisions of this subsection shall apply only to vessels engaged in transportation between the terminal facilities of the pipeline and ports under the jurisdiction of the United States. Strict liability under this subsection shall cease when the oil has first been brought ashore at a port under the jurisdiction of the United States.

(8) In any case where liability without regard to fault is imposed pursuant to this subsection and the damages involved were caused by the unseaworthiness of the vessel or by negligence, the owner and operator of the vessel, and the Fund, as the case may be, shall be subrogated under applicable State and Federal laws to the rights under said laws of any person entitled to recovery hereunder. If any subrogee brings an action based on unseaworthiness of the vessel or negligence of its owner or operator, it may recover from any affiliate of the owner or operator, if the respective owner or operator fails to satisfy any claim by the subrogee allowed under this paragraph.

(9) This subsection shall not be interpreted to preempt the field of strict liability or to preclude any State from imposing additional requirements.

(10) If the Fund is unable to satisfy a claim asserted and finally determined under this subsection, the Fund may borrow the money needed to satisfy the claim from any commercial credit source, at the lowest available rate of interest, subject to approval of the Secretary.

(11) For purposes of this subsection only, the term "affiliate" includes—

(A) Any person owned or effectively controlled by the vessel owner or operator; or

(B) Any person that effectively controls or has the power effectively to control the vessel owner or operator by—

(i) stock interest, or

(ii) representation on a board of directors or similar body, or

(iii) contract or other agreement with other stockholders, or

(iv) otherwise; or

(C) any person which is under common ownership or control with the vessel owner or operator.

(12) The term "person" means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or an unincorporated organization.

ANTITRUST LAWS

Sec. 205. The grant of a right-of-way, permit, lease, or other authorization pursuant to this title shall grant no immunity from the operation of the Federal anti-trust laws.

ROADS AND AIRPORTS

Sec. 206. A right-of-way, permit, lease, or other authorization granted under section 203(b) for a road or

airstrip as a related facility of the trans-Alaska pipeline may provide for the construction of a public road or airstrip.

TITLE III—NEGOTIATIONS WITH CANADA

SEC. 301. The President of the United States is authorized and requested to enter into negotiations with the Government of Canada to determine—

(a) the willingness of the Government of Canada to permit the construction of pipelines or other transportation systems across Canadian territory for the transport of natural gas and oil from Alaska's North Slope to markets in the United States, including the use of tankers by way of the Northwest Passage;

(b) the need for intergovernmental understandings, agreements, or treaties to protect the interests of the Governments of Canada and the United States and any party or parties involved with the construction, operation, and maintenance of pipelines or other transportation systems for the transport of such natural gas or oil;

(c) the terms and conditions under which pipelines or other transportation systems could be constructed across Canadian territory;

(d) the desirability of undertaking joint studies and investigations designed to insure protection of the environment, reduce legal and regulatory uncertainty, and insure that the respective energy requirements of the people of Canada and of the United States are adequately met;

(e) the quantity of such oil and natural gas from the North Slope of Alaska for which the Government of Canada would guarantee transit; and

(f) the feasibility, consistent with the needs of other sections of the United States, of acquiring additional energy from other sources that would make unnecessary the shipment of oil from the Alaska pipeline by tanker into the Puget Sound area.

The President shall report to the House and Senate Committees on Interior and Insular Affairs the actions taken, the progress achieved, the areas of disagreement, and the matters about which more information is needed, together with his recommendations for further action.

Sec. 302. (a) The Secretary of the Interior is authorized and directed to investigate the feasibility of one or more oil or gas pipelines from the North Slope of Alaska to connect with a pipeline through Canada that will deliver oil or gas to United States markets.

(b) All costs associated with making the investigations authorized by subsection (a) shall be charged to any future applicant who is granted a right-of-way for one of the routes studied. The Secretary shall submit to the House and Senate Committees on Interior and Insular Affairs periodic reports of his investigation, and the final report of the Secretary shall be submitted within two years from the date of this Act.

Sec. 303. Nothing in this title shall limit the authority of the Secretary of the Interior or any other Federal official to grant a gas or oil pipeline right-of-way or permit which he is otherwise authorized by law to grant.

TITLE IV—MISCELLANEOUS

VESSEL CONSTRUCTION STANDARDS

Sec. 401. Section 4417a of the Revised Statutes of the United States (46 U.S.C. 391a), as amended by the Ports

and Waterways Safety Act of 1972 (86 Stat. 424, Public Law 92-340), is hereby amended as follows:

"(C) Rules and regulations published pursuant to subsection (7)(A) shall be effective not earlier than January 1, 1974, with respect to foreign vessels and United States-flag vessels operating in the foreign trade, unless the Secretary shall earlier establish rules and regulations consonant with international treaty, convention, or agreement, which generally address the regulation of similar topics for the protection of the marine environment. In absence of the promulgation of such rules and regulations consonant with international treaty, convention, or agreement, the Secretary shall establish an effective date not later than January 1, 1976, with respect to foreign vessels and United States-flag vessels operating in the foreign trade, for rules and regulations previously published pursuant to this subsection (7) which he then deems appropriate. Rules and regulations published pursuant to subsection (7)(A) shall be effective not later than June 30, 1974, with respect to United States-flag vessels engaged in the coastwise trade."

VESSEL TRAFFIC CONTROL

Sec. 402. The Secretary of the Department in which the Coast Guard is operating is hereby directed to establish a vessel traffic control system for Prince William Sound and Valdez, Alaska, pursuant to authority contained in title I of the Ports and Waterways Safety Act of 1972 (86 Stat. 424, Public Law 92-340).

CIVIL RIGHTS

Sec. 403. The Secretary of the Interior shall take such affirmative action as he deems necessary to assure that no person shall, on the grounds of race, creed, color,

[93] 46 U.S.C.A. § 391a.

national origin, or sex, be excluded from receiving, or participating in any activity conducted under, any permit, right-of-way, public land order, or other Federal authorization granted or issued under title II. The Secretary of the Interior shall promulgate such rules as he deems necessary to carry out the purposes of this subsection and may enforce this subsection, and any rules promulgated under this subsection, through agency and department provisions and rules which shall be similar to those established and in effect under title VI of the Civil Rights Act of 1964.

CONFIRMATION OF THE HEAD OF THE MINING ENERGY POLICY OFFICE

Sec. 404. The Director of the Energy Policy Office in the Executive Office of the President shall be appointed by the President, by and with the advice and consent of the Senate: *Provided*, That if any individual who is serving in this office on the date of enactment of this Act is nominated for such position, he may continue to act unless and until such nomination shall be disapproved by the Senate.

CONFIRMATION OF THE HEAD OF TH MINING ENFORCEMENT AND SAFETY ADMINISTRATION

Sec. 405. The head of the Mining Enforcement and Safety Administration established pursuant to Order Numbered 2953 of the Secretary of the Interior issued in accordance with the authority provided by section 2 of Reorganization Plan Numbered 3 of 1950 (64 Stat. 1262)[*] shall be appointed by the President, by and with the advice and consent of the Senate: *Provided*, That if any individual who is serving in this office on the date

[*] 11 U.S.C.A. § 1451 note.

of enactment of this Act is nominated for such position, he may continue to act unless and until such nomination shall be disapproved by the Senate.

EXEMPTION OF FIRST SALE OF CRUDE OIL AND NATURAL GAS OF CERTAIN LEASES FROM PRICE RESTRAINTS AND ALLOCATION PROGRAMS

Sec. 406. (a) The first sale of crude oil and natural gas liquids produced from any lease whose average daily production of such substances for the preceding calendar month does not exceed ten barrels per well shall not be subject to price restraints established pursuant to the Economic Stabilization Act of 1970, as amended, or to any allocation program for fuels or petroleum established pursuant to that Act or to any Federal law for the allocation of fuels or petroleum.

(b) To qualify for the exemption under this section, a lease must be operating at the maximum feasible rate of production and in accord with recognized conservation practices.

(c) The agency designated by the President or by law to implement any such fuels or petroleum allocation program is authorized to conduct inspections to insure compliance with this section and shall promulgate and cause to be published regulations implementing the provisions of this section.

ADVANCE PAYMENTS TO ALASKA NATIVES

Sec. 407. (a) In view of the delay in construction of a pipeline to transport North Slope crude oil, the sum of $5,000,000 is authorized to be appropriated from the United States Treasury into the Alaska Native Fund every six months of each fiscal year beginning with the fiscal year ending June 30, 1976, as advance payments

chargeable against the revenues to be paid under section 9 of the Alaska Native Claims Settlement Act, until such time as the delivery of North Slope crude oil to a pipeline is commenced.

(b) Section 9 of the Alaskan Native Claims Settlement Act[35] is amended by striking the language in subsection (g) thereof and substituting the following language: "The payments required by this section shall continue only until a sum of $500,000,000 has been paid into the Alaska Native Fund less the total of advance payments paid into the Alaska Native Fund pursuant to section 407 of the Trans-Alaska Pipeline Authorization Act. Thereafter, payments which would otherwise go into the Alaska Native Fund will be made to the United States Treasury as reimbursement for the advance payments authorized by section 407 of the Trans-Alaskan Pipeline Authorization Act. The provisions of this section shall no longer apply, and the reservation required in patents under this section shall be of no further force and effect, after a total sum of $500,000,000 has been paid to the Alaska Native Fund and to the United States Treasury pursuant to this subsection."

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EQUITABLE ALLOCATION OF NORTH SLOPE CRUDE OIL

Sec. 410. The Congress declares that the crude oil on the North Slope of Alaska is an important part of the Nation's oil resources, and that the benefits of such crude oil should be equitably shared, directly or indirectly, by all regions of the country. The President shall use any authority he may have to insure an equitable allocation of available North Slope and other crude oil resources and petroleum products among all regions and all of the several States.

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[35] 43 U.S.C.A. § 1608(g).

SEPARABILITY

Sec. 411. If any provision of this Act or the applicability thereof is held invalid the remainder of this Act shall not be affected thereby.

Approved Nov. 16, 1973.